

No. 13145

United States
Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

CECIL A. MILLER,
Respondent.

Transcript of Record

Petition to Review a Decision of
The Tax Court of the United States.

FILED

JAN - 9 1952

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer Docket No. 23268.....	7
Answer Docket No. 24478.....	13
Certificate of Clerk.....	120
Decision Docket No. 23268.....	112
Decision Docket No. 24478.....	113
Exhibits, Petitioner's:	
No. 1—Property Settlement Agreement Between Jared H. Miller and Cecil S. Miller.....	31
2—Supplemental Property Settlement- Agreement	44
3—Complaint for Divorce.....	51
4—Interlocutory Judgment of Divorce	57
5—Final Judgment of Divorce.....	58
Exhibits, Respondent's:	
A—Income Tax Return for the Calendar Year 1945	72
B—Income Tax Return for the Calendar Year 1946	74
C—Letter Dated July 13, 1937.....	84
D—Letter Dated May 3, 1937.....	87
E—Letter Dated May 17, 1937.....	89
F—Letter Dated July 7, 1937.....	91

INDEX	PAGE
Findings of Fact and Opinion.....	100
Findings of Fact	101
Opinion	106
Names and Addresses of Attorneys.....	1
Notice of Filing Petition for Review.....	117, 118
Official Report of Proceedings.....	14
Witnesses, Petitioner's:	
McCoy, Philbrick	
—direct	15
—cross	23
Miller, Cecil	
—direct	30
—cross	68
—redirect	77
Witnesses, Respondent's:	
Miller, Jared H.	
—direct	94
—cross	96
Potter, Bernard	
—direct	79
—cross	92
—redirect	94
Order Enlarging Time.....	119
Petition Docket No. 23268.....	3
Ex. A—Notice of Deficiency.....	5

INDEX	PAGE
Petition Docket No. 24478.....	8
Ex. A—Notice of Deficiency.....	11
Petition for Review.....	113
Statement of Points.....	121
Statement Re Diminution of Record.....	124

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GEORGE BOUCHARD,

650 South Spring St.,
Los Angeles 14, California.

In the Tax Court of the United States

Docket No. 23268

CECIL A. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Symbols IT:HSA:CONF) dated February 28th, 1949, and as a basis of her proceeding alleges as follows:

(1) That petitioner is an individual residing at 174 South Mango Street, Fontana, California. The return for the period here involved was filed with the Collector for the 6th District of California.

(2) The notice of deficiency was mailed to the petitioner on February 28th, 1949; a copy of the deficiency notice and so much of the statement contained therein as is material is attached hereto and marked Exhibit "A."

(3) The taxes in controversy are income taxes for the calendar year 1945 in the amount of \$1,207.00.

(4) The determination of tax set forth in said

notice of deficiency is based upon the following errors:

(a) The inclusion in income under Section 22(k) of the Internal Revenue Code of the sum of \$6,300.00 received by petitioner during the calendar year pursuant to a property settlement agreement entered into between petitioner and her husband on June 15, 1937.

(5 The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) On June 15, 1937, petitioner and her husband entered into a property settlement agreement; petitioner was granted an interlocutory judgment of divorce from her husband by the Superior Court of San Bernardino County, California, on August 23, 1937, and was granted by the same Court a final decree of divorce on August 25, 1938; the property settlement agreement was not intended to, and did not in fact, alter the relationship of the parties thereto except with regard to their property rights, and was not an incident to the divorce. Neither the interlocutory decree nor the final judgment of divorce made any provision for alimony or support for petitioner. The payments received by petitioner during 1945 under said agreement were not periodic payments in discharge of a legal obligation imposed upon or incurred by the husband because of the marital relationship, or imposed upon him by a Court decree divorcing the parties, or by a written instrument incident to such divorce, and accordingly, the payments received by petitioner

are not includable in her income for 1945 under Section 22(k) of the Internal Revenue Code, or any other section.

Wherefore, petitioner prays that this Court may hear the proceeding and determine that there is no deficiency in income tax for the calendar year 1945.

/s/ GEORGE BOUCHARD,
Counsel for Petitioner.

[Duly verified.]

EXHIBIT A

Treasury Department
Internal Revenue Service
Los Angeles 12, Calif.

IT: 331

Office of the Collector,
Sixth District of California.

In Replying Refer to IT:HSA:CONF,
Room 1731, Federal Bldg.

Feb. 28, 1949.

Cecil A. Miller,
174 So. Mango St.,
Fontana, California.

Serial No. 79570259-46 List

Dear Mr. Miller:

You are advised that the determination of your income tax liability for the taxable year 1945 discloses a deficiency of \$1,207.00 as shown by the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned. Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, Washington 25, D. C., for a redetermination of the deficiency.

If you consent to the proposed assessment, you are requested to sign the enclosed agreement (on page 4 of the enclosed statement) and notice and demand for payment will be sent you, or you may immediately forward remittance for the deficiency tax and interest now due to the Collector of Internal Revenue, Los Angeles 12, California.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner of Internal
Revenue.

By /s/ HARRY C. WESTOVER,
Collector of Internal
Revenue.

JVD:1c

Enclosures:
Statement

STATEMENT

The statement which accompanied the Notice of Deficiency in so far as material to the issues set out in the Assignment of Error is as follows:

“Alimony payments of \$6300.00 are includible in income under Section 22 (k) of the Internal Revenue Code.”

Duly served May 25, 1949.

[Endorsed]: Filed May 24, 1949.

[Title of Tax Court and Cause.]

Docket No. 23268

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph (1) of the petition.

(2) Admits that the notice of deficiency was mailed to the petitioner on February 28, 1949. Denies the remaining allegations of paragraph (2) of the petition.

(3) Admits the allegations contained in paragraph (3) of the petition.

(4) (a) Denies the allegations of error contained in subparagraph (a) of paragraph (4) of the petition.

(5) (a) Denies the allegations contained in subparagraph (a) of paragraph (5) of the petition.

(6) Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

[Endorsed]: Filed July 11, 1949.

[Title of Tax Court and Cause.]

Docket No. 24478

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Symbols IT:HSA:JVD) dated July 13, 1949, and as a basis of her proceeding alleges as follows:

(1) That petitioner is an individual residing at 174 South Mango Street, Fontana, California. The return for the period here involved was filed with the Collector for the 6th District of California.

(2) The notice of deficiency was mailed to the

petitioner on July 13, 1949; a copy of the deficiency notice and so much of the statement contained therein as is material is attached hereto and marked Exhibit "A."

(3) The taxes in controversy are income taxes for the calendar year 1946 in the amount of \$995.60.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The inclusion in income under Section 22(k) of the Internal Revenue Code of the sum of \$6,300.00 received by petitioner during the calendar year pursuant to a property agreement entered into between petitioner and her husband on June 15, 1937.

(5) The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) On June 15, 1937, petitioner and her husband entered into a property settlement agreement; petitioner was granted an interlocutory judgment of divorce from her husband by the Superior Court of San Bernardino County, California, on August 23, 1937, and was granted by the same Court a final decree of divorce on August 25, 1938; the property settlement agreement was not intended to, and did not in fact, alter the relationship of the parties thereto except with regard to their property rights, and was not an incident to the divorce. Neither the interlocutory decree nor the final judgment of divorce made any provision for alimony or support for petitioner. The payments received by

petitioner during 1946 under said agreement were not periodic payments in discharge of a legal obligation imposed upon or incurred by the husband because of the marital relationship, or imposed upon him by a Court decree divorcing the parties, or by a written instrument incident to such divorce, and accordingly, the payments received by petitioner are not includable in her income for 1946 under Section 22(k) of the Internal Revenue Code, or any other section.

Wherefore, petitioner prays that this Court may hear the proceeding and determine that there is no deficiency in income tax for the calendar year 1946.

/s/ GEORGE BOUCHARD,
Counsel for Petitioner.

[Duly verified.]

EXHIBIT A

Treasury Department
Internal Revenue Service
Los Angeles 12, California

Office of the Collector,
Sixth District of California.

In replying refer to IT:HSA:JVD,
Room 1731 Federal Building.

July 13, 1949.

Mrs. Cecil Anabel Miller,
174 So. Mango St.,
Fontana, California.

Serial No. 85611405-47 List

Dear Mrs. Miller:

On April 14, 1949, you were notified of an apparent deficiency in your income tax for 1946 and advised of your privilege to file a protest within 30 days from that date. No protest has been received in this office.

The correct amount of the deficiency has been finally determined to be \$995.60 (see attached explanatory statement). Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, Washington 25, D. C., for a redetermination of the deficiency.

If you consent to the proposed assessment, you are requested to sign the enclosed agreement (on

page 4 of the enclosed statement) and notice and demand for payment will be sent you, or you may immediately forward remittance for the deficiency tax and interest now due to the Collector of Internal Revenue, Los Angeles 12, California.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner of
Internal Revenue.

By /s/ HARRY C. WESTOVER,
Collector of Internal Revenue.

JVD:1c

Enclosures: Statement.

STATEMENT

The statement which accompanied the Notice of Deficiency in so far as material to the issues set out in the Assignment of Error is as follows:

“Alimony payments of \$6300.00 are includible in income under Section 22 (k) of the Internal Revenue Code.”

[Served Aug. 11, 1949.]

[Endorsed]: Aug. 10, 1949.

[Title of Tax Court and Cause.]

Docket No. 24478

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) and (2) Admits the allegations contained in paragraphs (1) and (2) of the petition.

(3) Admits that the taxes in controversy are income taxes for the calendar year 1946; denies the remaining allegations contained in paragraph (3) of the petition.

(4)(a) Denies the allegations of error contained in paragraph (4)(a) of the petition.

(5)(a) Admits that at some time prior to the taxable year involved herein (the exact time is not known to respondent) the petitioner and her husband Jared H. Miller separated and were divorced by judicial decree (a copy of which is not attached to the petition or furnished to respondent, so as to fully advise him of its contents); that prior to their divorce the Millers entered into an agreement, so respondent is informed, and believes, settling their property rights and providing for payments of alimony to the petitioner; that pursuant to the said agreement, the petitioner received during the year 1946, \$6,300.00, which amount the respondent determined to be income to the petitioner on au-

thority of Sec. 22(k) of the Internal Revenue Code, and included the same in her income in the computation upon which the deficiency notice is based. Respondent denies all allegations of paragraph (5)(a) of the petition not just above admitted.

(6) Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

[Endorsed]: Filed Sept. 12, 1949.

[Title of Tax Court and Causes.]

Docket Nos. 23268 and 24478

OFFICIAL REPORT OF PROCEEDINGS

The Court: The next case is Cecil S. Miller, Docket Nos. 23268 and 24478.

I might say that I have read the pleadings and that I know what the case is all about.

You are claiming that these payments which Mrs. Miller received are not taxable under 23G and K and 22U.

Mr. Bouchard: I had a fine opening statement that I am not going to make.

The Court: I think also you are taking that position because you claim the agreement was not entered in the divorce, but was something separate from it.

Mr. Bouchard: Yes.

Judge McCoy, would you take the stand please.

Whereupon,

PHILBRICK McCOY

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Witness: Philbrick McCoy, Judge of the Superior Court, Los Angeles County, Los Angeles 12.

Mr. Bouchard: There are two cases on the docket, 23268 and 22478, and I take it there has been no formal motion made to consolidate the cases.

The Court: They may be consolidated. [4*]

Mr. Bouchard: For the sake of the record, I have Mrs. Miller in court and she waives any claim of privilege you may have, Judge McCoy, as her former attorney, in testifying.

Direct Examination

By Mr. Bouchard:

Q. Are you acquainted with Mrs. Cecil Miller, the Petitioner in this case? A. Yes, sir.

Q. Did she ever consult you professionally?

A. Yes.

Q. Do you remember when?

A. Sometime about the middle of October in 1936.

Q. For what purpose?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Philbrick McCoy.)

A. She had received a communication from her husband, Dr. Jared H. Miller, with respect to a proposed property settlement agreement and she employed me to advise her with respect to that matter and to conduct the subsequent negotiations.

Q. And who represented Dr. Miller?

A. At that time an attorney in Detroit named Wheat and locally by Bernard Potter, Senior.

Q. Of Los Angeles? A. Of Los Angeles.

Q. And during what period of time, Judge McCoy, did you [5] conduct negotiations looking toward this property settlement agreement?

A. Almost continuously from that date—I think it was October 31 that Mrs. Miller first retained me until the property settlement agreement was signed sometime in June of 1947, as I recall the date.

Q. Wasn't it '37? A. '37, excuse me.

Q. Were all of the negotiations in connection with that property settlement carried on by you with the attorneys for Mr. Miller? A. Yes.

Q. You never had any direct negotiation of any kind with him?

A. Not that I recall until the time the agreement was signed and in some other matters thereafter.

Q. Now, in connection with that agreement, who made the first proposal? A. Dr. Miller.

Q. Do you recall what his offer was?

A. In substance that he would provide for Mrs.

(Testimony of Philbrick McCoy.)

Miller an income of approximately \$400 a month and would give to her outright, he to maintain, what became known as the Fontana property; that is a residence in Fontana, California. [6]

Q. Was that offer accepted? A. No.

Q. Did you make a counter proposal?

A. Yes, sir.

Q. Do you recall what it was?

A. Substantially that Mrs. Miller—Dr. Miller then being a legal resident of Michigan—was entitled to her one-third—equivalent of a one-third dower interest under the laws of Michigan, and she demanded assignment of that one-third dower interest in his properties; and in addition thereto an income assured to her of approximately six thousand dollars a year.

Q. The properties in question owned by Dr. Miller were Michigan mining properties, were they not? A. Yes.

Q. And stock in Michigan mining corporations?

A. That is correct.

Q. Did Dr. Miller's attorney give you any favorable consideration to that proposal, if you know?

A. They considered it and later rejected it.

Q. Do you know why Dr. Miller rejected that proposal?

A. I was informed in connection with the negotiations that he rejected it because he did not desire to have Mrs. Miller an owner of interest, any proportional interest, in the mining properties, the

(Testimony of Philbrick McCoy.)

theory being in his mind, the idea [7] being in his mind, that it would embarrass him with his associates to have Mrs. Miller become an owner.

Q. Did he then make a counterproposal?

A. He then made a proposal, the substance of which, as I recall it, came along about January or February.

Q. Of 1936?

A. 1937. He was to give her an income of something like six thousand dollars, which she had demanded in lieu of her interest in these mines, these mining properties, and the stocks and other things that he owned.

He said in effect, I will keep the mining interests, I will keep what I have got, but I will assure you of six thousand or sixty-four hundred dollars a year, I forget what the exact figure was.

Q. Is that the figure that is in the property settlement agreement? A. Yes.

In addition thereto he proposed to give her the Fontana property as her own, and to make certain provisions—the details of which I have forgotten—for the support of her son, then a minor. I think he was about 18 or 19 at the time, as I recall it. This was to be done in the event of Mrs. Miller's death, and likewise to make certain provisions in his will for the support of Mrs. Miller's mother, whose name I have forgotten. [8]

Q. Now, those financial arrangements in substance which you have testified to were the financial

(Testimony of Philbrick McCoy.)

arrangements that were ultimately incorporated in the property settlement executed in June of 1937, is that correct? A. Substantially, yes.

Q. And those agreements were reached in about January or February of 1937?

A. As I recall it.

Q. Why did it take so much time to get the settlement in shape between January and the time of the execution in June?

A. The personal property. Dr. Miller had acquired in his travels—their travels—I would venture to say, as I recall the situation, a matter of five to six hundred curios, such as rugs, vases, and certain things of that type and the distribution or the division of those items, ultimately reflected in schedules A and B, was the basis for the time consuming element for the next four or five months.

Q. Now, Judge, do you recall when the division of that personal property was finally agreed upon and the terms of the ultimate agreement **reached?**

A. Sometime in May of '37, as I recall it.

Q. Why was it that the agreement was not signed until June 15th of '37?

A. Because about that time Mr. Potter, the [9] attorney, the local attorney, the Los Angeles attorney, for Dr. Miller informed me that he then anticipated Dr. Miller's arrival in California sometime in the near future.

Q. Now, Judge, at the time that Mrs. Miller employed you, did she say anything to you about her desire of wanting to secure a divorce?

(Testimony of Philbrick McCoy.)

A. Yes, she said she didn't want one.

Q. And that was when she came to you in October of 1936? A. That is right.

Q. Did either Dr. Miller or his attorneys ever indicate to you that Dr. Miller wanted a divorce and that this property agreement was contingent upon Mrs. Miller getting one? A. No.

Q. Did they indicate, either Dr. Miller or his attorneys, that the making of the property agreement was a part of a contemplated divorce action?

A. Not at all.

Q. Now——

A. Let me qualify that. Having in mind that the agreement was later approved by the Superior Court of Santa Barbara County—I am not quite sure because I haven't read the agreement for some years, but it may have contained the customary clause that if, as and when, either party might [10] obtain a divorce it could be submitted to the court for approval.

Q. I will say to you, Judge, that it does contain that provision. A. Yes.

Q. But as far as the execution of the agreement was concerned, it was never involved in any way with the contemplated divorce action?

A. None whatsoever.

Q. Nor were you ever advised by either Dr. Miller or either of his attorneys that it was contemplated that it would be signed only in the event of a divorce?

(Testimony of Philbrick McCoy.)

A. There was no such suggestion.

Q. Now, Mrs. Miller did ultimately file suit for a divorce shortly after the property settlement was signed, did she not?

A. Sometime late in June, as I recall it, of 1937.

Q. When did Mrs. Miller first inform you that she thought she would file an action for divorce?

A. It might have been late in April and it might have been early in May of 1937, somewhere along in there, but not before that.

Q. Did she give you any reason for her change of mind as to why she would file such an action?

A. Yes. [11]

Q. What reason did she give?

A. Mrs. Miller at that time was living and had for several years—I have forgotten how many—in Fontana, California, San Bernardino County, which is some eighteen miles from here, and at that time, 1936, it was relatively a small town. Like all small towns everybody knew each other's business, and Mrs. Miller advised me that any number of her friends and acquaintances were constantly asking her when Dr. Miller was coming home, and in order to avoid that embarrassment and to terminate any discussion among her friends and acquaintances in Fontana, she said she had decided to get a divorce. That is substantially the statement she made.

Q. I think the record will show, Judge McCoy, that this action was started on the 23rd day of June, 1937, and the property settlement was signed June 15, 1937.

(Testimony of Philbrick McCoy.)

Why was this divorce action started so soon after the property settlement was executed?

A. As a matter of convenience. After Mrs. Miller reached the conclusion I have just stated to proceed with the divorce action, and Mr. Potter having informed me that Dr. Miller's presence was expected in Los Angeles shortly, Mrs. Miller concluded on my advice to file the action forthwith, that is, relatively speaking, in order that personal service of the communication and complaint might be had on Dr. Miller, thus requiring him to plead within a matter of ten days before [12] the date of service and thereby avoid service of summons by publication, which would have entailed a matter of some 90 days' delay.

Q. In other words, you started to obtain service in California?

A. That is right, and in order to serve him when he was here in connection with the signing of the agreement.

Q. Now, you obtained both the interlocutory and final decrees for Mrs. Miller?

A. That is right.

Q. It was an uncontested case?

A. Uncontested.

Q. Dr. Miller did not appear?

A. Did not appear or answer.

Q. You are familiar, are you not, Judge, with the supplemental agreement that was made April 19, 1938, between Mrs. Miller and her former husband, I think you prepared it, did you not?

(Testimony of Philbrick McCoy.)

A. Yes, that had to do with certain changes, as I recall it, in the arrangement made with respect to the Fontana property.

Q. Now, was that supplemental agreement of April, 1938, ever submitted to the clerk for approval? A. No.

Q. As I understand your testimony, all of [13] the financial terms of the property settlement agreement were agreed upon between you and counsel for Mr. Miller back in January or February of 1937, is that right? A. That is right.

Q. And nothing was ever said to you by Mrs. Miller about a divorce until some time in the latter part of April or May of 1937?

A. Thereabouts.

Q. And neither Dr. Miller nor any of his attorneys ever indicated to you that there was any connection between the property settlement agreement and the divorce action?

A. None whatsoever.

Mr. Bouchard: You may cross-examine.

Mr. Flynn: Judge McCoy, I only have a few questions and I will try to make them very brief.

Cross-Examination

By Mr. Flynn:

Q. To refresh you recollecton, Judge McCoy, I show you what purports to be a letter on your stationery, dated——

(Testimony of Philbrick McCoy.)

Mr. Bouchard: May I see it?

Mr. Flynn: Yes.

It is dated July 13, 1937.

The Witness: Yes.

Q. (By Mr. Flynn): Judge McCoy, did you have any corespondence with [14] the attorneys for Dr. Miller prior to the granting of the divorce or the filing of the divorce in which you indicated to the other side that you would file a default for Dr. Miller in the divorce case?

A. That I would file a default for him?

Q. I should say that you would enter his default in the case.

A. I may very well have, I don't recall it, but I may very well have, because it would be a normal practice that once a defendant having been served and fails to respond to the summons, when the time is up I would enter his default. I have done it a thousand times.

Q. You had an agreement, did you not, Judge McCoy, with the other side in that case that you would receive attorney fees from Dr. Miller?

A. Yes, about a thousand dollars, I think, if I remember the figure correctly.

Q. Then you knew at that time it would not be a contested divorce?

A. The thousand dollars was for the property settlement agreement. Once the divorce action came along I had a further agreement, and I forget the fee he did pay me, but he did pay me a fee. When

(Testimony of Philbrick McCoy.)

that agreement was entered into, I couldn't begin to tell you, but I had such an agreement, yes. [15]

Q. Just prior to the filing of the divorce complaint, isn't it true that the agreement and the divorce were considered together in correspondence principally?

A. Quite likely, because by this time, if I remember correctly, I had informed Dr. Miller's attorney—I had referred in a letter as early as sometime in the latter part of April, that a divorce was in the wind, but by this time the property settlement was coming up to an end, and Mrs. Miller had advised me, as I just indicated, that she had concluded to get a divorce. Bernard Potter and I would stand on the street corner at Fifth and Spring any number of times during the lunch hour when we would meet and chew the fat about it, and then we would reduce the matters to correspondence. I don't doubt but that many times I referred to a divorce in the same letter that I was writing about the property settlement. I didn't keep two separate files in this respect.

Q. Weren't you at one time advised by Attorney Potter for Dr. Miller that unless Mrs. Miller signed the agreement that Dr. Miller would not go through with the divorce as planned?

A. That Dr. Miller wouldn't go through with the divorce? Dr. Miller had nothing to do with it. If he wanted to answer it and contest it, he might, but I don't recall any such conversation as [16] that.

(Testimony of Philbrick McCoy.)

Q. Judge McCoy, I show you what purports to be a certified copy of the interlocutory judgment in the case of Miller versus Miller in the State Court of California, County of San Bernardino, and ask you if that is a copy of the interlocutory decree which was entered in that case?

A. Not having read it, I wouldn't testify, but seeing the clerk's certification on there, I would say yes.

Q. Judge, was this decree prepared around the same time that the agreement was prepared?

A. No, that decree was prepared either a couple of days before or a couple of days after the case was tried on the default in San Bernardino County. I may have had it with me when I went over there, and then again I may have sent it over. My recollection is that I did not send over the decree until after the trial.

Q. I show you what purports to be a certified copy of the complaint in the case——

A. It appears to be. That is my signature.

Q. Is that your signature there? A. Yes.

Q. About when did you prepare this complaint, Judge McCoy, do you remember?

A. A week or ten days possibly before it was filed.

Q. About a week or ten days before it was filed?

A. In sufficient time for Mrs. Miller to have it signed [17] the next time she came in to Los Angeles from Fontana. I would have to check my files to see what date it was.

(Testimony of Philbrick McCoy.)

Let me see it a minute. It is verified June 22, 1937, and it purports to have been filed—was filed June 23. The chances are ten to one that I prepared that between the 15th of June, the date of the property settlement agreement, and the date it was verified.

Q. Now, Judge McCoy, I show you the interlocutory judgment which we were talking about a minute ago, and ask you if it isn't true that specifically as it pertains to paragraphs 2 and 3 of said document, that you drafted this interlocutory document?

A. I drafted the whole thing. My secretary typed it.

Q. And where in the second paragraph it refers to the plaintiff being entitled to a divorce and so forth, and in the third paragraph where it refers to the fact that a property settlement agreement dated June 15, 1937, was entered into between Jared H. Miller, above-named defendant, and Cecil S. Miller, that you also drafted those two paragraphs when you drafted the interlocutory judgment?

A. Yes, I drafted that. It is common practice in this state to incorporate in a property settlement agreement the language to the effect that this is not an agreement for a divorce, but if a divorce is sought or granted to either party, no divorce being pending, or if it is a fact that the [18] divorce action is pending, this agreement may be submitted to the court and may be approved, and that is pre-

(Testimony of Philbrick McCoy.)

cisely what was done in this case and in the complaint which was filed in this action if my memory serves me correctly.

In order that I could obtain the relief which I sought, I recited in paragraph 4 of the complaint: "The plaintiff and defendant have entered into a property settlement agreement for the care and maintenance of the plaintiff during the rest of her natural life, dated June 15, 1937, said agreement is acceptable to the plaintiff and will be submitted to the entitled court at the hearing of this action for approval of the court. Whereafter, the plaintiff prays that the bonds of matrimony now in existence between the defendant and herself be dissolved and that the property settlement agreement between the parties of this action dated June 15, 1937, be ratified and approved. The plaintiff may have her costs and such further equitable relief as may be just and proper."

The original was submitted to the court on the date the case was tried, and it was approved, and the decree was then prepared as you have just indicated.

Q. Judge McCoy, I have just one or two more questions.

After the agreement was signed and after the divorce decree was entered, within the years following that, did you at any time write a letter to Mr. Bernard Potter [19] regarding the tax consequence of that agreement?

(Testimony of Philbrick McCoy.)

I show you this letter to refresh your recollection.

A. That is my signature. Yes, I wrote that letter February 12, 1943, after the point had been raised notwithstanding what had transpired in the past that Mrs. Miller was going to have to pay income tax on what she received from Dr. Miller.

Q. Judge McCoy, on February 12, 1943, it was your opinion on that date that Mrs. Miller under the agreement and under the circumstances at the time the agreement was executed was liable for the tax on the payments she received under the agreement?

Mr. Bouchard: That calls for a conclusion and it is immaterial.

The Witness: I should say in the first place that it wasn't my opinion. In the second place, I didn't have an opinion because I by no means am an expert on income tax matters. Consequently, I didn't press that too much.

Mr. Flynn: No further questions. Thank you very much, Judge McCoy.

The Court: Mr. Bouchard, do you have any further questions?

Mr. Bouchard: No further questions.

The Court: You are excused.

(Witness excused.) [20]

Whereupon,

CECIL MILLER

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: Cecil Miller, 174 South Mango, Fontana.

Direct Examination

By Mr. Bouchard:

Q. Now, Mrs. Miller, I want you to speak up loudly so the court can hear what you have to say. Will you do that, please? A. Yes.

Mr. Bouchard: Your Honor, I want to offer three or four documents into evidence. Counsel and I have stipulated that these are correct copies of the originals.

I want to offer as the first exhibit the property settlement agreement between Jared H. Miller and Cecil S. Miller dated June 15, 1937.

Mr. Flynn: No objection. My understanding is that that is the same agreement that I examined in the office.

Mr. Bouchard: That is so, and that is the only agreement that I have.

The Court: Admitted. [21]

The Clerk: Exhibit 1.

(The document above referred to was marked Petitioner's Exhibit No. 1 and received in evidence.)

(Testimony of Cecil Miller.)

PETITIONER'S EXHIBIT No. 1

Property Settlement Agreement Between Jared H.
Miller and Cecil S. Miller

This agreement made and entered into this 15th day of June, 1937, by and between Jared H. Miller, of Fontana, California, hereinafter called the First Party, and Cecil S. Miller, of the same place, hereinafter called the Second Party ;

Witnesseth:

Whereas, the said parties were married on or about the twenty-fourth day of December, 1921, in the City of Gardena, County of Los Angeles, State of California, and ever since said date have been and now are husband and wife; and

Whereas, the parties hereto are desirous of entering into an agreement settling and adjusting their property rights of every kind, nature and description in any property belonging to them, or either of them, and establishing their mutual rights in such property ;

Now, therefore, said parties for the considerations hereinafter particularly set forth, and their mutual agreements hereinafter contained, do hereby stipulate and agree as follows:

First. (1) The First party, Jared H. Miller, is now the true and lawful owner of the following described property, both real and personal, other

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)
than the personal property, described in Schedules A and B attached hereto, as his sole and separate property, to wit:

1. Fontana Property, which is more particularly described as follows:

The East Two and five hundred seventy-five thousandths (E.2.575) acres of the North half of the East half (N.1/2 or E.1/2) of Farm Lot Six hundred fifty-seven (657), as numbered and delineated on map showing subdivision of lands belonging to Semi-Tropic Land and Water Company, recorded in Book 11 of Maps at Page 12, records of San Bernardino County. The areas and distances of the above-described real property are computed to the centers of all adjoining streets and roads as shown on said map.

2. Big Bear Lease, which is more particularly described as follows:

Term Lease of Lot 309 from United States Government, on North side of Big Bear Lake, San Bernardino County, California.

3. Undivided 2/5ths interest in Morris Mine, which is more particularly described as follows:

Lease No. 9—N.W.1/4 of S.E.1/4 of Section One, Township 47 N., Range 28 West.

Lease No. 24—E.1/2 of S.W.1/4 Section 1.

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

Lease No. 25—Lot 2 and the S.W. $\frac{1}{4}$ of S.W. $\frac{1}{4}$, Section 1.

Lease No. 26—S.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ and all that part of Lot 3, lying south of the center line of Section 2. All situated in Section 2, Township 47 N., Range 28 West.

Lease No. 27—All of Lot 4 of Section 2, lying South of center line of said section and all their right, title and interest in the S.W. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ of Section 2.

Lease No. 28—N.E. $\frac{1}{4}$ of S.W. $\frac{1}{4}$, Section 2, Township 47 North, Range 28 West.

All situate in the State of Michigan.

4. All other real estate in the State of Michigan, title to which is in the name of First Party.

5. Stock in Barnes Land Company, a Michigan corporation, standing in name of First Party.

6. All securities of Lake Superior Land Company, a Michigan corporation whose charter has expired, and Emery Land Company, a Michigan corporation, standing in the name of First Party or held in his possession, or otherwise owned by him.

7. All other cash, bank accounts and securities registered or standing in the name of First Party or held by him, or otherwise purporting to be owned by him.

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

(2) The Second Party, Cecil S. Miller, is not now the true and lawful owner of any property, real or personal, other than the personal property described in Schedules A and B attached hereto, as her sole and separate property, and other than cash on hand and bank accounts in the name of the Second Party.

(3) First and Second Parties are not now jointly the lawful owners of any personal or other property, as joint tenants or as tenants in common.

Second. (1) Coincident with the execution of this agreement, the First Party by appropriate instrument, will convey to the Second Party a life estate in the real property situated at Fontana, San Bernardino County, California, more particularly described in Paragraph First (1) as the Fontana Property, and the First Party agrees that the Second Party shall thereafter have exclusive possession and control of said property during the remainder of her natural life, to be used, however, by her and the members of her immediate family as a home, and not to be rented by her or otherwise used for profit or gain.

(2) The First Party will pay all taxes that have accrued and that may hereafter accrue and become a lien on said property, and will pay the balance of the principal of the purchase price of said property as it may fall due, together with the interest

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

thereon, now secured by a mortgage which is a lien against the said property. The First Party will also secure and keep in force adequate insurance against loss of the buildings on said property by fire. Second Party, during her lifetime, will pay all the expenses for the ordinary care and upkeep of said property, and will not incur any obligations for extraordinary expenses without the written approval of First Party. First Party may enter and inspect the said premises at reasonable times, not in person, however, but by an agent duly authorized by him and approved by Second Party.

(3) Upon demand by Second Party, but not prior to November 10, 1937, First Party will expend the sum of \$750.00 for the improvement of said real estate at Fontana, California, particularly in the planting and replanting of said land, and the completion of the construction of a library in the part of the premises originally designated as a garage, and the furnishings thereof; all, however, under the direction of First Party. The First Party may expend such other sums for the improvement of said real estate from time to time as he may desire, with the approval of the Second Party as to the purpose thereof so long as she shall occupy said property as her home.

(4) At any time during the lifetime of the Second Party, and with the consent of the parties hereto, First Party will sell or exchange the real

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

property at Fontana, California, hereinabove more particularly described, and with the proceeds of such sale, together with such additional amounts as said First Party may deem proper, or upon such exchange, will purchase other property in Fontana, California, suitable for residence purposes, and the Second Party shall have a life estate in any such property so purchased, subject to the terms and conditions herein set forth with respect to her life estate in said property at Fontana, California, as hereinabove set forth.

Third. (1) First Party will pay Second Party the sum of \$6,300.00 per year, so long as Second Party shall live, payable at the rate of \$1,200.00 per quarter on the tenth day of the months of February, May, August and November of each year, commencing the tenth day of August, 1937, and \$1,250.00 on November 15, 1937, and \$1,500.00 on November fifteenth of each year thereafter, commencing November 15, 1938; provided, however, that the total payments to Second Party in any year shall not exceed fifty per cent (50%) of First Party's net income for the previous calendar year. Any reductions in the payments to Second Party by reason of this provision shall be ratably apportioned among the instalments above provided.

(2) For the purposes of this agreement, "net income" means "net income" as defined by section

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

21 of the Revenue Act of 1936 relating to the payment of income taxes to the United States, less Federal income tax on the net income of the First Party for the calendar year for which such net income is computed; provided, however, that for the purposes of this agreement capital gains and losses, as defined by the Revenue Act of 1936, shall not be considered in computing such net income; and provided, further, that all the ordinary and necessary business expenses of First Party incurred in connection with the ownership and operation of the mining properties owned by him in the State of Michigan or elsewhere, or in connection with the ownership of securities in corporations or associations owning or operating mining properties in the State of Michigan or elsewhere, shall be considered as deductions in computing such net income, when claimed as such by First Party under the provisions of the Revenue Act of 1936, whether or not such deductions are ultimately allowed by the Commissioner of Internal Revenue.

(3) The amount or amounts of any reduction in payments made to Second Party below \$6,300.00 per year, pursuant to this agreement, however, shall be repaid to Second Party out of Fifty per cent of the excess over \$12,000.00 per annum of the next payments received by First Party from the operation of such mining properties and from such dividends and interest in such corporations or as-

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

sociations owning or operating such mining properties.

(4) It is contemplated that the annual payments of \$1500.00, payable on November fifteenth each year, shall be placed and held by Second Party in a special trust or fund, revocable or irrevocable as she may decide, in order to provide a fund for the ordinary care and upkeep of the Fontana property as herein provided, and to provide for her a reserve for unexpected emergencies; provided, however, that there shall be no liability on the part of the Second Party for her failure to maintain such special fund, and her failure to do so shall not affect her right to continue to receive the amounts hereinabove set forth.

(5) If the Second Party survives the First Party, then upon his death the amounts herein provided to be paid to the Second Party shall be paid to her as herein provided by the executors of the estate of the First Party until such time as the residue of his estate may be distributed to this testamentary trustees. Upon the distribution of the residue of said estate to the testamentary trustees thereof, if the fair value of such residue shall equal or exceed the sum of \$150,000.00, Second Party will accept an agreement by the testamentary trustees of the residue of said estate directly assuming the obligations of the First Party under this agreement, and upon acceptance of such agreement from

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

said testamentary trustees, will consent to the discharge of the executors of the estate of the First Party and to the closing of said estate and the transfer of the residue thereof to said testamentary trustees. If the fair value of the residue of the estate of the First Party distributed to the testamentary trustees is less than \$150,000.00, the amount of the payments to be made to Second Party shall be reduced in the same proportion to \$6,300.00 as the fair value of such residue at the time of such distribution bears to \$150,000.00, and Second Party will accept an agreement by the testamentary trustees to assume such obligation and will consent to the closing of the estate as aforesaid.

(6) First Party will not, during his lifetime, sell, mortgage or otherwise dispose of an undivided one-fifth ($1/5$ th) of the Morris Mine as described above, being one-half ($1/2$) of his undivided two-fifths ($2/5$ ths) interest therein, without the consent of Second Party or without providing that the proceeds of such sale or disposition shall stand subject to the same restraint on the power of First Party to alienate the same, or without providing security for the performance of this agreement by depositing with trustees property of the fair value of \$150,000.00.

(7) Except as hereinabove provided, nothing in this agreement contained shall constitute a lien upon any of the property or estate of First Party or

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

upon any royalties, payments, interest, dividends or other income accruing to First Party.

Fourth. (1) In the event of the death of Second Party prior to the death of First Party, First Party agrees to pay to the son of Second Party, Myron A. Sheward, \$100.00 per month for his lifetime, or until the death of the First Party, he, the said Myron A. Sheward, then to receive such amounts as First Party may provide for in his Will.

(2) In the event of the death of the Second Party prior to the death of the First Party, First Party agrees to pay to Mrs. B. A. Doggett, mother of the Second Party, should she then be living, the sum of \$35.00 per month for her lifetime, or until the death of the First Party, she, the said Mrs. B. A. Doggett, then to receive such amounts as First Party may provide in his Will.

Fifth (1) The Second Party, coincident with the execution of this agreement, will by an appropriate instrument, convey any right, title or interest she may now have in or to the property or cabin belonging to the First Party at Bear Lake, California, located on United States Government Lease No. 309, and in or to said lease; and the First Party, coincident herewith, will, by appropriate instrument, transfer and convey to Second Party all right, title and interest he may have in

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)
and to his life membership in the Peter Pan Woodland Club.

(2) The personal property, including the household furniture, furnishings and fixtures owned by the parties hereto, on the execution of this agreement, shall be distributed between the parties hereto in accordance with the Schedules hereto annexed. Thereupon, the property described in Schedule A shall be and become the sole and separate property of the First Party, free and clear of all present or future claims of the Second Party, and the property described in Schedule B shall be and become the sole and separate property of the Second Party, free and clear of all present or future claims of the First Party. First Party agrees that he will remove all his separate property as in Schedule A described from the residence at Fontana, California, and that Second Party will not hereafter be charged with the custody or care of any part thereof.

Sixth (1) This agreement shall not alter the relations of the parties hereto except with regard to their property rights; provided, however, that in the event that either party hereto shall obtain a divorce from the other, this agreement may be submitted to the court in which said divorce is obtained for approval.

(2) This agreement is a full, complete and final

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

settlement of all the property rights of the parties hereto, and neither party hereto, either as heir at law of the other party or otherwise, shall make further claim on any kind whatsoever upon the other, nor for any other or further property than the property received by the parties hereto, respectively, under the terms of this agreement.

(3) Except as herein provided, all claims of either party against the other, in the event of the death of either party hereto, as surviving husband or wife, respectively, and all right to administer or apply for letters of administration upon the estate of the other are hereby expressly waived and relinquished.

(4) The property received or retained by each of the parties hereto, respectively, is received, and the agreements herein contained are made, by each of the parties hereto in lieu of all rights which the law would give the other as husband or wife, or as a surviving husband or wife, and except as herein provided, the property so received or retained and so declared to be the property of the respective parties hereto shall be and forever remain the sole and separate property of such parties, each party having full power to sell, assign and deal with the same as though each of the parties was unmarried.

(5) Each party hereto further agrees to sign,

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

acknowledge, execute and deliver to the other party, when requested so to do, any and all documents and papers which may be necessary or convenient or may be required by any purchaser to enable each of the parties hereto to receive, sell or dispose of the property acquired or received or to be held by each party under the terms of this agreement, or of other property hereinabove declared to be the property of said parties, or either of them. . .

(6) Each of said parties has been separately represented and fully advised by their own attorneys as to their rights and liabilities and as to the nature, extent and force of this agreement.

(7) This agreement shall bind the executors, administrators, representatives, heirs and assigns of the parties hereto, and the testamentary trustees of the estate and Will of First Party.

In Witness Whereof, the parties hereto have signed this agreement the day and year first hereinabove written.

/s/ JARED H. MILLER,
JARED H. MILLER,
First Party.

/s/ CECIL S. MILLER,
CECIL S. MILLER,
Second Party.

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 1—(Continued)

SCHEDULES "A" AND "B"

[Schedule "A" is a list of articles of personal property referred to in the foregoing property settlement agreement which was to be and remain the individual property of Jared H. Miller, the first party to the agreement, and schedule "B" is a list of articles of personal property, referred to in that agreement, which was to be and remain the individual property of Cecil S. Miller, the second party to the agreement.]

Admitted in evidence Dec. 1, 1950.

Mr. Bouchard: And as the next exhibit a supplemental property settlement between the same parties dated April 19, 1938.

Mr. Flynn: No objection.

The Court: It may be admitted.

The Clerk: Exhibit 2.

(The document above referred to was marked Petitioner's Exhibit No. 2 and received in evidence.)

PETITIONER'S EXHIBIT No. 2

Supplemental Property Settlement Agreement

This agreement made April 19, 1938, by Jared H. Miller, of Negaunee, Michigan, hereinafter called the First Party, and Cecil S. Miller, of Fon-

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 2—(Continued)

tana, California, hereinafter called the Second Party;

Witnesseth:

Whereas, the parties hereto, on June 15, 1937, entered into a Property Settlement Agreement settling and adjusting their property rights of every kind, nature and description in any property belonging to them, or either of them, and establishing their mutual rights in such property; and

Whereas, by said agreement, First Party agreed, among other things, to convey to Second Party a life estate in the real property situated at Fontana, San Bernardino County, California, described therein as,

The East two and five hundred seventy-five thousandths (E. 2.575) acres of the North half of the East Half (N. $\frac{1}{2}$ of E. $\frac{1}{2}$) of Farm Lot Six Hundred Fifty-seven (657), as numbered and delineated on map showing subdivision of lands belonging to Semi-Tropic Land and Water Company, recorded in Book 11 of Maps at Page 12, records of San Bernardino County. The areas and distances of the above-described real property are computed to the centers of all adjoining streets and roads as shown on said map,

and did thereafter convey such life estate to Second Party; and

Whereas, by said agreement, First Party further

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 2—(Continued)

agreed, among other things, to pay all taxes on said property and to pay the balance of the principal of the purchase price of said property as it may fall due, together with interest thereon, then and now secured by a mortgage which is a first lien against said property; and to secure and keep in force adequate insurance against loss of the buildings on said property by fire; and upon demand of Second Party, but not prior to November 10, 1937, to expend the sum of \$750.00 for the improvement of said real estate at Fontana, California, and to expend such other sums for the improvement of said real estate from time to time as First Party might desire; and

Whereas, by letter of March 8, 1937, the First Party agreed to pay the sum of \$75.00 for a chair frame to be made to fit a certain Brussels silk Tapestry chair seat and chair back, inventory items numbers 378 and 379, included in Schedule B attached to and made a part of said property settlement agreement; and

Whereas, Second Party, by said property settlement agreement agreed, among other things, during her lifetime to pay all the expenses for the ordinary care and upkeep of said Fontana property and agreed not to incur any obligations for extraordinary expenses without the written approval of First Party; and

Whereas, the parties hereto now desire to terminate their several obligations hereinabove men-

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 2—(Continued)

tioned, as more particularly set forth and described in said property settlement agreement;

Now, Therefore, in consideration of the premises, and in consideration of the performance by each of said parties of their mutual agreements hereinafter contained, said parties do hereby stipulate and agree as follows:

First: First Party represents that the balance due on the purchase price of said Fontana property, secured by a mortgage on said property, is the sum of \$1,000.00, which said sum is due and payable on or before December 1, 1938, and that said mortgage is the only incumbrance against the said property. First Party agrees to pay said balance of the purchase price, with the interest thereon, when due, on condition that upon the signing of this agreement, Second Party will deliver to the attorney for the First Party to be delivered to a storage warehouse in Los Angeles, California, to be designated by First Party, the articles of personal property hereinafter mentioned, in good condition and unbroken, to be held by said storage warehouse for delivery to First Party upon the payment of said sum and the satisfaction of said mortgage, which said payment shall be evidenced by a statement of such payment and satisfaction signed by the mortgagee, to be delivered to said storage warehouse, and by it delivered to Second Party. The parties further agree that if business conditions are such at the time said payment of

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 2—(Continued)

said balance of the purchase price is due, that First Party finds it necessary to obtain and does obtain an extension or extensions of time within which to make the final payment thereon, this agreement shall continue in force until he shall have paid said balance in full and shall not be invalidated by reason of such extensions; provided, however, that said articles of personal property shall remain in storage and escrow until said balance has been paid in full.

Second: Second Party agrees that upon the signing of this agreement, she will cause to be delivered in good condition and unbroken, to the attorney for First Party, upon his receipt therefor, to be stored in such storage warehouse, the following articles of personal property, indicated upon Schedule B, attached to said property settlement agreement, by the numbers hereinafter set before each such article:

Inventory

Number	Description
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235—	One paid Bronze Torchones.
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242—	One Lemon Yellow Table Lamp, Blue Peacock Design.
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376—	Rene Lalique Black Vase.
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389—	Sheffield Soup Tureen.
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390—	Sheffield Candelabra (two pieces).
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391—	Sheffield Candle Sticks (two pieces).
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392—	Russian Cathedral Cope.
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(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 2—(Continued)

Third: First Party agrees that he will execute and, upon the delivery of said articles of personal property to said storage warehouse, as hereinabove provided, he will deliver to Second Party a grant deed of the real property at Fontana, California, hereinabove more particularly described, as the separate estate of Second Party. Second Party agrees that upon the delivery of said deed, First Party shall be relieved of his financial obligations with respect to the taxes upon and the care and maintenance of and the insurance against loss by fire of the buildings upon said real property, and he shall be further relieved of his obligations to expend the said sum of \$750.00, or any other sum, for the improvement of said real property, all as more particularly set forth and described in said Property Settlement Agreement, and he shall be further relieved of his obligation to pay the sum of \$75.00 for a chair seat and chair back, inventory items numbers 378 and 379, included in Schedule B attached to and made a part of said Property Settlement Agreement.

Fourth: Except as hereby modified, the provisions of said Property Settlement Agreement of June 15, 1937, shall remain in full force and effect.

Fifth: Said parties have been separately represented and fully advised by their own attorneys as to their respective rights and liabilities and as to the nature, extent and force of this agreement.

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 2—(Continued)

Sixth: This agreement shall bind the executors, administrators, representatives, heirs and assigns of the parties hereto and the testamentary trustees of the estate and will of First Party.

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

/s/ JARED H. MILLER,
JARED H. MILLER,
First Party.

/s/ CECIL S. MILLER,
CECIL S. MILLER,
Second Party.

Admitted in evidence Dec. 1, 1950.

Mr. Bouchard: The respondent's counsel has asked me to offer and I will offer a certified photostatic copy of the summons in the case of Cecil S. Miller versus Jared H. Miller, and a copy, a photostatic copy of the complaint in that action. I think that the Clerk might clip the two together as one exhibit if he cares to.

Mr. Flynn: No objection.

The Court: Admitted.

The Clerk: Exhibit 3.

(The document above referred to was marked Petitioner's Exhibit No. 3 and received in evidence.)

(Testimony of Cecil Miller.)

PETITIONER'S EXHIBIT No. 3

In the Superior Court of the State of California
in and for the County of San Bernardino

No. 41354

CECIL S. MILLER,

Plaintiff,

vs.

JARED H. MILLER,

Defendant.

COMPLAINT FOR DIVORCE

Plaintiff complains of the above-named defendant, and for cause of action alleges:

I.

Plaintiff is a citizen of the United States and for more than one year last past has been a resident of Fontana, in the County of San Bernardino, State of California. Plaintiff and defendant now are husband and wife.

II.

The statistics required to be set forth by Section 426a of the Code of Civil Procedure are as follows:

Plaintiff and defendant were married in the City of Gardena, California.

The date of their marriage was December 24, 1921.

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 3—(Continued)

Plaintiff and defendant separated on or about July 24, 1936.

A period of approximately fourteen years and six months has elapsed between the date of said marriage and the date of separation.

There were no children born of said marriage.

III.

As cause for divorce, plaintiff alleges that during the period of approximately one year and six months last past defendant has been extremely cruel to the plaintiff and has inflicted grievous mental suffering upon her in the following particulars:

During the months of August and September, 1935, plaintiff was confined for medical and surgical care at a hospital in Rochester, Minnesota, returning to her home in Fontana with defendant from Rochester on or about October 1, 1935. While plaintiff was so confined in said hospital, defendant resided in Rochester at the home of one Mrs. Melvin Paulson, and defendant became infatuated with said Mrs. Melvin Paulson during said period of time, all without the knowledge of the plaintiff.

Immediately after Christmas in the year 1935, defendant, without informing plaintiff of the real purpose of his departure, left their home in Fontana, California, to return to Rochester, Minnesota, where he stayed substantially all of the time until his subsequent return to Fontana, California, on or about March 17, 1936, and plaintiff is informed and

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 3—(Continued)

believes, and upon such information and belief alleges that during said period of time, defendant stayed at the home of said Mrs. Melvin Paulson.

Upon the return of the defendant to their home in Fontana, California, plaintiff, through inadvertence, discovered several letters written to defendant by said Mrs. Melvin Paulson, expressing her love for the defendant and her infatuation for him. On the discovery of said letters, plaintiff confronted defendant with the knowledge so obtained of his relations with said Mrs. Paulson, and defendant thereupon admitted the fact that he was in love with the said Mrs. Paulson and stated that he did not feel that he could continue to live with the plaintiff. Thereafter, during the month of May, 1936, defendant, in a letter to the said Mrs. Paulson, stated to her that the situation between them had been accidentally discovered and "thus there has occurred all the elements of a very sad case of the eternal triangle," and in said letter expressed his love for her and his desire to please her in preference to pleasing plaintiff. Plaintiff does not know whether said letter was in fact sent to Mrs. Paulson.

Another letter of the same character was thereafter written by the defendant to the said Mrs. Paulson again expressing his love for her and his desire to get said plaintiff used to the idea of their relations and his further desire to have the reply which the said Mrs. Paulson might write to said letter, in such shape that defendant could show it

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 3—(Continued)

to the said plaintiff, and in said letter to said Mrs. Paulson made some suggestions as to the sort of letter she should write to defendant, purporting to express her willingness to wait until such time as defendant might join her. Plaintiff inadvertently discovered said letter, written in longhand by defendant, but does not know whether it was ever sent.

Thereafter, on or about July 24, 1936, defendant departed from his home in Fontana, California, and on about September 22, 1936, by letter addressed to plaintiff, advised her that he had come to a decision regarding the affairs of the plaintiff and the defendant, stating in part that he had given careful consideration to their relations and to the possibility of his returning to live with her as husband and wife, and that he had come to the conclusion that he did not want to do it, saying that he did not have any real desire to return to her and that his every feeling was against it, and expressing his desire to enter into an agreement for her support and maintenance and for her care during the natural life of the plaintiff. Thereupon, plaintiff, at the instance of the defendant, entered into negotiations with him for the settlement of their affairs.

At the time plaintiff discovered defendant's relations with the said Mrs. Melvin Paulson, she was not in good health and was then and ever since has been under the care of physicians. The discovery

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 3—(Continued)

of said relationship and the subsequent events with reference to the negotiations for the completion of said settlement agreement have aggravated her ill health and caused her grievous mental suffering and distress.

IV.

The plaintiff and defendant have entered into a property settlement agreement and an agreement for the care and maintenance of the plaintiff during the rest of her natural life, dated June 15, 1937. Said agreement is acceptable to the plaintiff and will be submitted to the above-entitled court on the hearing of this action, for approval of the court.

Wherefore, plaintiff prays that the bonds of matrimony now existing between herself and the defendant be dissolved and that the property settlement agreement between the parties to this action, dated June 15, 1937, be ratified and approved, and that the plaintiff may have her costs and such further and equitable relief as may seem just and proper.

/s/ PHILBRICK McCOY,
Attorney for Plaintiff.

In This Action, the defendant, Jared H. Miller, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of

(Testimony of Cecil Miller.)

Petitioner's Exhibit No. 3—(Continued)
said defendant in the premises is hereby duly entered according to law.

Attest: My hand and the seal of said Court, this
30th day of July, 1937.

[Seal] /s/ HARRY L. ALLISON,
Clerk.

By /s/ [Indistinguishable],
Deputy Clerk.

[Duly verified.]

[Certified true copy.]

[Admitted in evidence, Dec. 1, 1950.]

Mr. Bouchard: And next a certified copy of the interlocutory decree of divorce.

Mr. Flynn: No objection. [22]

The Court: Admitted.

The Clerk: Exhibit 4.

(The document above referred to was marked
Petitioner's Exhibit No. 4 and received in evidence.)

(Testimony of Cecil Miller.)

PETITIONER'S EXHIBIT No. 4

[Title of Superior Court of California, San Bernardino County, and Cause.]

No. D-41354

INTERLOCUTORY JUDGMENT
OF DIVORCE

(Default)

This cause came on to be heard the 23rd day of August, 1937, in Department 3, Philbrick McCoy, Esquire, appearing as attorney for plaintiff, and it appearing that defendant was duly served with process and has not appeared or answered the complaint, and that the default of defendant has been entered:

It Is Adjudged that plaintiff is entitled to a divorce from defendant; that when one year shall have expired after the entry of this interlocutory judgment a final judgment dissolving the marriage between plaintiff and defendant be entered, and at that time the Court shall grant such other and further relief as may be necessary to complete disposition of this action.

It is further ordered, adjudged and decreed that the Property Settlement Agreement, dated June 15, 1937, between Jared H. Miller, the above-named defendant, and Cecil S. Miller, the above-named plaintiff, and filed with this court as an exhibit in

(Testimony of Cecil Miller.)

the above-entitled proceeding, be and the same hereby is approved.

Done in open Court this 23rd day of August, 1937.

CHAS. L. ALLISON,
Judge.

[Endorsed]: Filed and entered August 24, 1937,
Superior Court.

Admitted in evidence December 1, 1950, U.S.D.C.

Mr. Bouchard: And the last exhibit is a certified copy of the final judgment of divorce in this case.

Mr. Flynn: No objection.

The Court: It is admitted.

The Clerk: Exhibit 5.

(The document above referred to was marked
Petitioner's Exhibit No. 5 and received in evidence.)

PETITIONER'S EXHIBIT No. 5

[Title of Superior Court of California, for San Bernardino County, and Cause.]

No. D-41354

FINAL JUDGMENT OF DIVORCE

In this cause an interlocutory judgment was entered on the 24th day of August, 1937, adjudging

(Testimony of Cecil Miller.)

that plaintiff was entitled to a divorce from defendant, and more than one year having elapsed, and no appeal having been taken from said judgment, and no motion for a new trial having been granted and the action not having been dismissed;

Now, upon the Court's own motion, it is adjudged that plaintiff be and is granted a final judgment of divorce from defendant and that the bonds of matrimony between plaintiff and defendant be, and the same are, dissolved.

It is further ordered and decreed that wherein said interlocutory decree makes any provision for alimony or the custody and support of children, said provision be and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full, and that wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto.

Done in open Court this 25th day of August, 1938.

[Seal] /s/ CHAS. L. ALLISON,
Judge.

[Endorsed]: Filed and entered August 25, 1938,
Superior Court.

Admitted in evidence December 1, 1950, U.S.D.C.

(Testimony of Cecil Miller.)

Q. (By Mr. Bouchard): Mrs. Miller, where do you reside? A. In Fontana, California.

Q. Is that in San Bernardino County?

A. Yes, sir.

Q. And you and Jared H. Miller, better known as Dr. Miller, were married in 1921, is that right?

A. Yes, sir.

Q. And had Dr. Miller been married before?

A. Yes, sir; four times.

Q. You were his fifth wife? A. Yes, sir.

Q. Was Dr. Miller older than you?

A. About 20 years. [23]

Q. Had you been married previously?

A. Once.

Q. And is your husband living or dead?

A. He died of tuberculosis. He died in 1913, of tuberculosis.

Q. You did not remarry until you married Dr. Miller in 1921? A. No.

Q. Did you have any children by your first marriage? A. Yes.

Q. A boy? A. A boy.

Q. And how old was he when your first husband died? A. About two years old.

Q. Now, Mrs. Miller, you and Dr. Miller continued to live in Los Angeles for how long after 1921?

A. We moved out to Fontana in April, I think, of 1923.

Q. And then you continued to live in Fontana

(Testimony of Cecil Miller.)

from 1923, until your separation in 1936, is that right? A. Yes.

Q. Now, I want you to skip over a period of time and go to a trip which you and Dr. Miller took sometime in December of 1934. Would you tell the court where you and Dr. Miller went?

A. We left here the day after Christmas in 1934, and [24] drove to Florida. We stayed there a couple of weeks and then went to Washington, D. C. There we left the car and went to New York and took a boat on a Mediterranean cruise and spent the month of April in London. We came back to New York and picked up the car and toured all through the New England States, Nova Scotia and Canada, and then went to Michigan where we spent a month.

Q. Then where did you go?

A. Then on the way home we stopped at Mayos. I had had stomach trouble all my life and we had always thought that some day we would go to Mayos and have an examination, and we stopped there, and after the examination I spent three weeks in the hospital.

Mr. Flynn: If the court please, it appears that the grounds for the complaint and the ground for the divorce are set forth in the complaint and I think unless counsel can show some purpose of going back that far to 1934, and to trips and that sort of thing, unless he has some other purpose in mind, I submit it is clearly irrelevant.

(Testimony of Cecil Miller.)

The Court: I assume that he has or he wouldn't be going back that far.

Mr. Bouchard: It will be disclosed, I hope.

The Court: All right.

Q. (By Mr. Bouchard): You underwent surgery? [25] A. Yes, sir.

Q. And then you and Dr. Miller returned to your home in Fontana about October 1, 1935?

A. Yes, sir.

Q. And continued to reside there until he left in July of 1936? A. Until January.

Q. He made a trip in January of 1936? Where did he go?

A. He went to Rochester, Minnesota.

Q. What reason did he give for going?

A. His daughter-in-law was expecting a baby and he wanted to be there when the child was born.

Q. When did he return from that trip?

A. Around the middle of March.

Q. 1936? A. Yes.

Q. Did anything happen at that time to mar the even tenor of your whole life? A. Yes, sir.

Q. Did you ever discover any letters?

A. Yes, I did.

Q. And what letters did you discover?

A. I discovered some letters from a woman in Rochester, Minnesota. [26]

Q. And what did those letters indicate to you?

A. They indicated that he had been on very intimate terms and relations.

Mr. Flynn: The complaint covers all of this,

(Testimony of Cecil Miller.)

your Honor, and if there is going to be testimony about the letters, I think the letters ought to be produced. I don't know why we are going through all of this. I don't see what we are accomplishing, Judge.

The Court: I don't know yet, but we haven't spent too much time on it.

Mr. Bouchard: I submit that he hasn't made an objection.

Q. (By Mr. Bouchard): Mrs. Miller, did you confront the doctor with those letters?

A. I did.

Q. What was the upshot of your discussion with him?

A. Well, he asked me what I wanted him to do, and I said, "I didn't see why we couldn't go on as we had," and we said we would try it.

Q. Did he make any statement to you to the effect that you forget the matter and he would forget this woman?

A. That he would try.

Q. And that was the understanding?

A. Yes. [27]

Q. Now, he made a trip east in July of 1936, did he not?

A. Yes.

Q. What was the occasion for that trip?

A. His annual trip to Michigan to oversee the mining properties and check up on things.

Q. And before he left did he make any improvements or changes in the house?

A. Yes, he took the garage and turned it into a library for himself to put some of his curios and

(Testimony of Cecil Miller.)

collections in, and made the garage over in the poultry plant, and that was not completed when he left. The inside was not finished.

Q. Now, when he left did he give you or did he tell you when he expected to return?

A. Yes, he gave me the date of his return.

Q. And when did he tell you he would return?

A. In September.

Q. Of '36? A. Yes.

Q. And during the absence in July and August did you hear from him? A. Yes.

Q. And did you write to him? A. Yes.

Q. Did he ever come back? [28] A. No.

Q. When did you first learn that he didn't intend to return?

A. He wrote me a letter in September, the latter part of September, that he was not returning.

Q. September of 1936?

A. That he thought things over and he didn't think it would hurt and he was not coming back.

Q. Did he say anything to you about any provision he was willing to make for you?

A. Yes. He had been giving me a check for \$400 a month and he said he would continue to do that.

Q. He would continue to give you \$400 a month, and did he suggest to you that you should see some attorney and negotiate a property settlement agreement? A. Yes.

Q. And you then in October of that year, 1936, consulted Mr. Philbrick McCoy? A. Yes.

(Testimony of Cecil Miller.)

Q. And that was Judge McCoy who was on the stand preceding you? A. Yes.

Q. He was then a practicing lawyer in this city?

A. Yes.

Q. And in that letter of September of 1936, that you [29] received did Dr. Miller say anything to you about a divorce? A. No.

Q. After you received that letter did you ever hear from him again? A. No.

Q. And did you ever have any discussion with your husband about the subject of divorce?

A. No.

Q. Never did? A. No.

Q. Now, who conducted the negotiations in your behalf? A. Mr. McCoy.

Q. In arranging this property settlement agreement? A. Yes.

Q. Do you know who made the first proposal of a settlement? A. I don't remember.

Q. Do you know whether he made it or did Mr. McCoy tell you that they had made it? Do you recall? A. I don't recall.

Q. Did you instruct Mr. McCoy to make any demand for the property agreement?

A. I think he got in touch with Mr. Potter, Dr. Miller's attorney, and he took it up with Dr. Miller, and he said as a provision that he would give me \$400 a month and [30] a place to live in Fontana as long as I lived.

Q. And did you accept that? A. No.

(Testimony of Cecil Miller.)

Q. What was your offer or demand?

A. Well, I thought I should have an interest, or a part of the interest in the estate in Michigan, which I understood, by Michigan law, I was entitled to.

Q. Did Mr. McCoy advise you as to whether or not that sort of deal was acceptable to Dr. Miller?

A. It wasn't.

Q. It was not? A. No.

Q. And did Mr. McCoy advise you that Dr. Miller had offered in lieu of your demand to increase his offer to \$6,300 a year and the Fontana property and a provision for your mother and son?

A. Yes.

Q. Was that offer acceptable to you?

A. Yes.

Q. And do you recall about when it was that Mr. McCoy advised you that the financial arrangements could be made?

A. It was either January or February.

Q. Now, this property settlement, Mrs. Miller, was not signed until apparently June of 1937, June 15th of 1937. Do you know why it took so many months before—took so many [31] months from January until May to get this property settlement agreement in shape?

A. Well, because of the correspondence that had gone on between Michigan and out here in regard to this division of the personal property.

Q. And the division that was ultimately made was the division that is shown in the property

(Testimony of Cecil Miller.)

schedule marked Schedules A and B, is that right?

A. Yes.

Mr. Bouchard: May I interject to your Honor, that when you examine it you will find that it is very extensive and covers a good many pages.

Q. (By Mr. Bouchard): Now, Mrs. Miller, at any time after Dr. Miller left in July of 1936, was there ever any discussion between you and him about divorce? A. No, I never saw him.

Q. You never saw him and you never heard from him?

A. Not directly. All I had was copies of the letters he sent to Mr. McCoy.

Q. At any time while this property settlement agreement was being negotiated did Mr. McCoy tell you that Dr. Miller wanted you to get a divorce?

A. I don't recall that he did.

Q. Did you ever discuss with Mr. McCoy the subject of [32] a divorce? A. I may have.

Q. Well, did you? A. I probably did.

Q. Well, you ultimately started suit for divorce in San Bernardino County, did you not?

A. Yes.

Q. This exhibit shows that it was started on the 22nd or 23rd of June, 1937, shortly after the signing of the property settlement agreement.

How long before that time did you talk to Mr. McCoy about getting the divorce?

A. Well, I wouldn't set any date. It wasn't long before I started it.

(Testimony of Cecil Miller.)

Q. Was it after the property settlement—you had been advised that the property settlement agreement had been agreed upon before you talked about it? A. Yes.

Q. Did you give Mr. McCoy any reason as to why you thought you would secure a divorce?

A. Well, we had a lot of friends in Fontana and I was constantly embarrassed when I was out by being asked when Dr. Miller was returning and I was always evading it because I was ashamed to say that I had been abandoned and left. So I decided I might as well get a divorce and have it on [33] the record.

Q. And so far as you were concerned then I get it from your testimony that you and Dr. Miller never discussed the subject of a divorce? In fact, you never heard from him and that you were never advised by Mr. McCoy that Dr. Miller's attorneys had discussed the matter of divorce with him?

A. No.

Mr. Bouchard: You may cross-examine.

Cross-Examination

By Mr. Flynn:

Q. Mrs. Miller, you stated that you received a letter from Dr. Miller advising you to see an attorney about a divorce, didn't you?

A. Not about a divorce.

Q. About a settlement?

A. About a settlement.

(Testimony of Cecil Miller.)

Q. Do you know which attorney that was? Did he mention the name of an attorney in that letter?

A. I don't remember that he did.

Q. Did you ever see any attorney before you went to Attorney McCoy at that time?

A. I was referred to Mr. McCoy by Mr. Potter.

Q. Did you go to see Mr. Potter? A. Yes.

Q. What did you go to see Mr. Potter [34] about?

A. I showed him the letter that I had received from Dr. Miller about his not returning and I asked him if he could act as my attorney in making up this agreement, and he said he would ask the doctor for his permission.

Q. You talked generally about a divorce to Mr. Potter, didn't you? A. No, I didn't.

Q. Didn't you mention divorce at all?

A. No.

Q. Then Mr. Potter referred you to Mr. McCoy?

A. He received a letter from Dr. Miller saying he would not release him, so he referred me to Mr. McCoy.

Q. Now, did you ever receive any letter from Dr. Miller, Mrs. Miller, at any time before June 15, 1937, referring to the word "divorce"?

A. I don't recall that I did. All the correspondence went through the attorneys after I went to Mr. McCoy.

Q. Can you indicate definitely that you never received any letter at all from him prior to that date regarding divorce?

(Testimony of Cecil Miller.)

A. I don't remember that I did.

Q. Your answer is you do not remember?

A. I do not remember.

Q. Now, you looked over this complaint for divorce, didn't you, Mrs. Miller? [35]

A. Yes.

Q. Before you signed it?

A. Yes. I haven't looked at it since.

Q. You signed this divorce, Mrs. Miller, right about the same time you were entering into the property agreement, didn't you?

A. No, it was after the property agreement had been agreed on.

Q. Do you remember how long after it was?

A. No.

Q. Within a few days, I suppose, wasn't it?

A. The main part of the property agreement had been agreed upon several months before.

Q. You signed a different agreement several months before June 15th?

A. No, we didn't sign it, but it was agreed upon.

Q. The only agreement that was signed up until that time was that one, wasn't it? A. Yes.

Q. When did you first talk to Mr. McCoy about a divorce, Mrs. Miller?

A. I don't remember what date. It has been a long time and I can't remember the date.

Q. It was around the same time that you were discussing the property agreement, wasn't it? [36]

(Testimony of Cecil Miller.)

A. No, it was not until after we had gotten that all settled that I said anything about a divorce.

Q. It was before you signed the property agreement, wasn't it?

A. I probably said I would get a divorce.

Q. Who did you say that to?

A. Mr. McCoy.

Q. Do you remember how long it was before that—

Mr. Bouchard: I wish both of you would speak up a little louder. I am having trouble hearing both of you.

Q. (By Mr. Flynn): Do you remember how long it was, Mrs. Miller, before you signed the divorce that you told Judge McCoy that you would get a divorce?

A. No, I don't because I didn't want a divorce. I didn't need a divorce. I never have needed a divorce.

Q. But now you said a minute ago that you did say to Judge McCoy or might have said that you would get a divorce?

A. I think that was brought out in Mr. McCoy's testimony.

Q. My question is, Mrs. Miller, do you remember how long it was?

A. I don't remember how long, no.

Q. The question is, how long before. Do you know how long it was before just so the record is clear? Do you know [37] how long it was before you

(Testimony of Cecil Miller.)

signed the agreement that you told Mr. McCoy that you would get a divorce? That was the question.

Now, your answer to that is what?

A. I don't know.

Q. Mrs. Miller, I show you your 1945 income tax return and I ask you if that is your signature?

Mr. Bouchard: I will admit that is a copy if you want to offer it into evidence.

Mr. Flynn: For 1945 and 1946, respectively. I offer them as exhibits.

The Clerk: The 1945 income tax return is Exhibit A, and the 1946 income tax return is Exhibit B.

The Court: They may be received.

(The documents above referred to were marked Respondent's Exhibits A and B and received in evidence.)

RESPONDENT'S EXHIBIT "A"

[This Exhibit is the United States individual income tax return for the calendar year 1945 of Cecil A. (Anabel) Miller and shows that the only item of gross income which she received during that year was \$6,300, as is evidenced by the following Schedule attached thereto:]

The taxpayer's only income is the sum of \$6,300.00 received from her former husband, Jared H. Miller, 390 Grove Street, Pasadena, California, pursuant to a property settlement agreement entered

(Testimony of Cecil Miller.)

into between them October 15, 1937. The taxpayer contends that this income is not taxable income to her under the provisions of section 22(k) of the Internal Revenue Code, for the reason that the payments received under said agreement are not in discharge of the legal obligations of the husband under the decree of divorce and are not an incident to the divorce. See *Frank v. Commissioner*, 51 F.(2d) 923 (C.C.A.3). A copy of the property settlement agreement herein referred to was attached to the return of the taxpayer filed with the Collector of Internal Revenue in 1943 of her income for 1942.

Dated at Fontana, California, February 26, 1946.

/s/ CECIL ANABEL MILLER.

Admitted in evidence Dec. 1, 1950.

RESPONDENT'S EXHIBIT "B"

[This Exhibit is the United States individual income tax return for the calendar year 1946 of Cecil Anabel Miller, and shows that the only item of gross income which she received during the year was \$6,300, as is evidenced by the following Schedule attached thereto as follows:]

(Testimony of Cecil Miller.)

February, 1947

March 4, 1947

Collector of Internal Revenue,
Federal Building,
Los Angeles 12, California.

Dear Sir:

The attached return is filed as required by law. It is considered by the taxpayer that Dr. Jared H. Miller, 390 Grove Street, Pasadena, California, is liable for the taxes due on the income of \$6,300.00 as indicated on the attached return, and that the undersigned is not liable therefor, by reason of the provisions of Section 22(k) of the Internal Revenue Code.

The liability of Jared H. Miller, and the non-liability of Cecil S. Miller, is fully explained in the rider attached to the return of Cecil S. Miller, under the name of "Cecil A. Miller" on form #1040, for the calendar year of 1942, filed in March, 1943, in this office and is based on the terms of a Property Settlement Agreement between the parties dated August 15, 1937, a copy of which agreement was filed with your office with said rider.

Reference is also made to your letter of September 26, 1946, to the taxpayer's attorney, Philbrick McCoy, Esq., and his letters to you in reply of September 30, and October 2, 1946.

CECIL S. MILLER.

Admitted in evidence Dec. 1, 1950.

(Testimony of Cecil Miller.)

Q. (By Mr. Flynn): Now, Mrs. Miller, I show you your 1945 income tax return and I call your attention to the figure of \$6300, which appears on lines 4 and 5 and ask you if that is the \$6300——

Mr. Bouchard: I will stipulate that it is on both returns.

Mr. Flynn: That it is?

Mr. Bouchard: That \$6300 is the amount she received from Dr. Miller under this property settlement agreement. [38]

Q. (By Mr. Flynn): You had no other income then during those years besides that? A. No.

Q. No income from any property of any kind?

A. No.

Q. Did you own any property of your own before you married Dr. Miller? A. No.

Q. You were a resident of California at the time?

A. I was born in California. I have always lived in California.

Q. And your legal residence was in California when the divorce was granted and when the property agreement was entered into? A. Yes.

Q. You say you live in Fontana right now?

A. Yes.

Q. Is that one of the properties that was originally owned by Dr. Miller? A. No.

Q. How long have you lived at your present address? A. Five years.

Q. Before that time where did you live?

(Testimony of Cecil Miller.)

A. I lived at 348 North Juniper Street.

Q. In Fontana? [39] A. Yes.

Q. That is where you lived when you lived with Dr. Miller?

A. No, we bought another house and sold that and moved into the grove, but that is where I lived when he left.

Q. After the divorce, Mrs. Miller, you continued to reside in the same house in which you were living with Dr. Miller, did you not? A. Yes.

Q. You stated that you made an offer or Dr. Miller made an offer to pay you \$400 a month, didn't you? A. He made the offer.

Q. Did he ever make you—when did he make you the offer of \$400 a month?

A. When he left on his trip in January.

Q. Of what year? A. 1936.

Q. January of 1936?

A. He deposited \$400 a month to my account to run the house on.

Q. How long did those deposits of \$400 a month continue?

A. Until the property settlement agreement went into effect.

Q. In connection with the property settlement agreement, [40] Mrs. Miller, you were advised by Judge McCoy as to approximately when the divorce would be entered, were you not? He gave you a pretty good idea as to when the divorce would be entered, didn't he? A. I suppose he did.

(Testimony of Cecil Miller.)

Q. And then how long it would take after that to get the divorce? A. Yes.

Q. This \$6300 which you received from the agreement, how did you receive that, directly in cash or by check?

A. No. There was a check for \$1200 sent to the bank and deposited in my account every three months and on December 15th the check for \$1500 was deposited extra.

Mr. Flynn: I have no further questions.

Mr. Bouchard: Mrs. Miller, I have one question.

Redirect Examination

By Mr. Bouchard:

Q. We have been talking about some mining properties that Dr. Miller had in Michigan. Do you know how he acquired those properties?

A. By inheritance.

Q. From whom?

A. From his former wife.

Q. The one who preceded you?

A. Yes. [41]

Q. In answer to one of Mr. Flynn's questions he asked you if you had ever received any letter from Dr. Miller about a divorce, and your answer to him was that you did not remember receiving any.

Didn't you tell me and haven't you told me in my office that you never received any letters from Dr. Miller after the letter of September 22, 1936,

(Testimony of Cecil Miller.)

in which he wrote you and said he was not going to return? Didn't you tell me that you had not received any after that time?

A. Well, I answered that letter before I went to see any attorney and I probably received an answer from him sometime saying that he was not returning.

Q. Well, at least during that period——

A. I didn't have any correspondence with him. It was all carried on through Mr. McCoy and Mr. Potter.

Q. Outside of the letter you received in September of 1936 and you replying to that letter, you never heard from him again?

A. I never had a letter from him about anything.

Mr. Flynn: I object to that as a leading question.

The Court: I think she said that before. At least, I understood her to say so.

Mr. Bouchard: No further questions.

The Court: Mr. Flynn.

Mr. Flynn: No questions. [42]

The Court: The witness is excused.

(Witness excused.)

The Court: Anything further?

Mr. Bouchard: The Petitioner rests.

Mr. Flynn: Yes, your Honor, I have two witnesses. I would like to call first of all Mr. Potter.

Whereupon,

BERNARD POTTER

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Have a seat, sir, and state your name and address.

The Witness: Bernard Potter, and my business address is 433 South Spring Street.

Direct Examination

By Mr. Flynn:

Q. Mr. Potter, what is your occupation?

A. I am an attorney at law.

Q. Here in Los Angeles?

A. In Los Angeles.

Q. How long have you been an attorney in Los Angeles? A. Since 1894.

Q. Do you know Mrs. Miller, who just left the stand? A. I do. [43]

Q. Did you ever talk to Mrs. Miller about a divorce in the year 1936 or 1937?

A. I don't know that I can answer that question directly except in this way: I had known Mrs. Miller and Dr. Miller for a great many years, Dr. Miller particularly, as I had been acting as his attorney up to that time.

Mrs. Miller came into my office in October, I am quite sure it was in 1936, and she then started in to say that Dr. Miller had another woman and that she had certain letters from this woman that

(Testimony of Bernard Potter.)

disclosed his infidelity and so forth and wanted to know if I would take action against him.

I immediately told her that I couldn't go into the merit of her case because I was his attorney and I didn't feel that I could. Whether I said to her that I would endeavor to secure his consent to or a waiver, I don't believe I did, but there is a possibility that I might have. At least, I said I couldn't discuss the merit of the case with her. She was very wrought up and so forth at that time and I don't know whether, but I do think she suggested to me that I secure—or she asked me to suggest some other lawyer and I suggested Philbrick McCoy, who was then a practicing attorney.

Whether the question of divorce directly was mentioned at that time I wouldn't want to say positively, but it was a proceeding that she wanted to take against him, which I [44] understood was a divorce proceeding, because she said it was impossible for her to live with him and that they had separated.

Q. Then you represented Dr. Miller in connection with the proceeding, did you not?

A. I represented him in connection with all of the proceedings that led up both to the divorce and to the property settlement?

Q. Did you draw the property settlement agreement?

A. I don't remember whether I had it drawn in

(Testimony of Bernard Potter.)

my office or not, but we collaborated on it. Mr. McCoy and I talked it over many times—the substance of it, and we endeavored to agree upon it and what was agreed upon later.

Q. What was your understanding, Mr. Potter, as to the connection between the divorce and the property settlement agreement?

Mr. Bouchard: I object to that as being an incompetent question. What his understanding is is not important.

Mr. Flynn: I will withdraw the question, your Honor.

Q. (By Mr. Flynn): Did you have any discussion with Mr. McCoy regarding whether or not the divorce would be contingent upon entering into the agreement?

A. I had many talks with Mr. McCoy about the whole matter and also about the question of the divorce. It was stated to me—stated to him by me that Dr. Miller would not [45] consider entering into any property settlement whatsoever unless a divorce was procured, and that of course, it could not be procured by him, but by her. In fact, I have forgotten the date now, but the letter here will disclose that—that prior to the 15th day of June when this property settlement was executed and the decree of divorce or the divorce was filed on the 22nd or 23rd of the same month, along prior to that, and arrangement was made by which Mr. McCoy was to be paid for securing this divorce. I

(Testimony of Bernard Potter.)

think \$250.00 was paid down to him by Dr. Miller through me.

I don't know what that letter states. He calls attention to the fact—Mr. McCoy does—that there is due him \$250.00 for the divorce.

The whole property settlement was predicated upon the understanding that a divorce would be filed, a divorce suit would be filed.

Q. That was your understanding at that time?

A. It is not my understanding, my knowledge.

Q. And in that connection did you indicate to Mr. McCoy whether or not the divorce would be a contested matter?

A. Well, you must remember in those days—if I digress a little bit, your Honor——

Mr. Bouchard: I shall object to any digressions being made. Answer the question.

The Witness: Repeat the question. [46]

The Court: Mr. Reporter, would you read the question, please?

(The question was read.)

The Witness: It was never agreed that it would be an uncontested matter, but, of course, we understood that the doctor would not fight the case. However, there was no agreement to that effect. That would have been against public policy.

Q. (By Mr. Flynn): Mr. Potter, I show you a letter dated July 13, 1937, addressed to Mr. Bernard Potter, Senior, Esquire. A. Yes.

(Testimony of Bernard Potter.)

Mr. Bouchard: May I see it, please?

Q. (By Mr. Flynn): It is signed by attorney Philbrick McCoy, and I ask you if that is one of the letters you received from Mr. McCoy?

A. That is a letter which I received from Attorney McCoy. This portion of it says——

Mr. Bouchard: Just a moment. He didn't ask you to read it.

Q. (By Mr. Flynn): Would you read the letter?

Mr. Bouchard: It isn't in evidence.

Mr. Flynn: I beg your pardon. [47]

Q. (By Mr. Flynn): Is this letter exactly as you received it from Mr. McCoy?

A. It is except there is some red pencil marks around here.

Q. Excluding the red pencil marks and the other pencil marks, is that letter just exactly as you received it? A. That is true.

Mr. Flynn: The Respondent offers this letter into evidence.

Mr. Bouchard: I object to the receipt of that letter into evidence because it is dated July 13, 1937, which is after the execution of the agreement and after the commencement of the action.

The Court: May I see it?

Mr. Bouchard: I object on the further grounds it doesn't tend to prove any issue in this case.

The Court: It may be admitted for what it may be worth.

(Testimony of Bernard Potter.)

The Clerk: Exhibit C.

(The document above referred to was marked Respondent's Exhibit C for identification and received in evidence.)

RESPONDENT'S EXHIBIT C

Philbrick McCoy

Attorney at Law

1015 Spring Arcade Building

Los Angeles, California

July 13, 1937.

Bernard Potter, Sr., Esquire,
Chester Williams Building,
Los Angeles, California.

My dear Mr. Potter:

I had a letter this morning from Mrs. Miller, who is on a trip up north, asking me, among other things, to notify Dr. Miller that she would like to have all checks from him pursuant to the recent property settlement agreement, made payable to Bank of America, Fontana Branch, Fontana, California, and sent to that bank with instructions to deposit the checks in Mrs. Miller's account. Would you be good enough to convey this information to Dr. Miller? I think the request will eliminate any difficulty which might otherwise arise as to the payment of the monies.

I understood you to say last month just prior to Dr. Miller's departure, that upon his return east

(Testimony of Bernard Potter.)

he would send me his check for \$250.00 to cover my fees for services to Mrs. Miller in connection with the pending divorce action. Will you remind him of this when you write him? You might tell him that I shall enter his default as soon as the thirty days have expired after service of the summons and complaint, but it would not seem likely that the matter can be set for hearing much before the end of August. I will keep you posted, however, as to the progress of the case and let you know if anything occurs in the meantime.

Permit me to take this occasion to say that it has been a pleasure to deal with you during the past several months on behalf of Mrs. Miller. It is not always that we have such pleasant experiences.

With kindest personal regards, as always, I am

Sincerely yours,

/s/ PHILBRICK McCOY.

PMcC:dc

Admitted in evidence Dec. 1, 1950.

Q. (By Mr. Flynn): Mr. Potter, I show you a letter from Mr. Philbrick [48] McCoy addressed to Bernard Potter, Senior, dated February 12, 1943. Is that letter, Mr. Potter, precisely the way it was when you received it shortly after February 12, 1943, with the exception of the pencil and ink marks on the letter? A. It is.

(Testimony of Bernard Potter.)

Mr. Flynn: The Respondent offers this letter as our next exhibit.

Mr. Bouchard: It is incompetent, irrelevant, and immaterial. It is a letter written in 1943 and has no bearing upon any of the issues in this case.

The Court: May I see it?

I don't see any relevancy in this letter, Mr. Flynn.

Mr. Flynn: I assumed it was relevant on the ground Judge McCoy when he was on the stand testified regarding the conversations in the latter years—prior to the taxable years—regarding Mrs. Miller's tax liability.

The Court: I don't see how it is material. The question is not when—the question is not what they did in 1943, but at the time of this agreement and the time of the divorce. I don't see any relevancy and the objection is sustained.

Q. (By Mr. Flynn): Mr. Potter, I show you a letter addressed to Dr. Jared H. Miller signed by you, dated May 3, 1937.

Mr. Bouchard: Counsel, may I suggest to save time [49] that if you have several letters that you would like to show the witness you let me have them while you are examining him on other matters and it will save time.

Q. (By Mr. Flynn): Mr. Potter, I show you a letter, the letter I called your attention to a minute ago, dated May 3, 1937, and ask you if that is your signature?

A. That is.

Q. And is that the letter which you wrote to Dr. Miller about—

A. It is.

(Testimony of Bernard Potter.)

Mr. Flynn: I offer the letter into evidence as the Respondent's exhibit next in order.

Mr. Bouchard: I object to that for the reason that the letter is from Mr. Potter to his client and is in no way binding upon the Petitioner in this case.

The Court: There might be some collaboration of the witness' testimony in there and it may be received.

Mr. Bouchard: I have read the letter.

The Clerk: Exhibit D.

(The document above referred to was marked Respondent's Exhibit D for identification and received in evidence.)

RESPONDENT'S EXHIBIT D

Potter & Potter

Attorneys at Law

Suite 814 Chester Williams Building

Los Angeles, California

May 3, 1937.

Dr. Jared H. Miller,
P. O. Lock Box 685,
Rochester, Minn.

Dear Doctor:

Your letter of May 1st just received, in which you stated that if I thought it advisable I could phone Mr. McCoy what you stated in regard to your probable adoption of the agreement in its

(Testimony of Bernard Potter.)

present form with minor changes. Also that you would wait for your final decision until you had seen Mr. Wheat.

While I was talking with him over the phone he asked if it was likely that you would be in Los Angeles around the time the settlement was finally agreed upon as it would expedite matters with regard to the divorce; that is, if you were here you could be served with the papers and the matter disposed of quickly. I told him that I did not know positively whether you would be here or not, but I thought some mention had been made in one of your letters that there was such a possibility.

I have not had a chance to get hold of Mr. Doody yet with regard to the oil matters, but I will do so at once.

The reason I am writing you upon the receipt of your letter is that you say "Please send the enclosure forward to Mrs. Miller at once." No doubt you referred to her check, but the check was not enclosed. You perhaps have discovered this and sent it on to me, but if not you will know that the check was not enclosed.

As soon as I have interviewed Mr. Doody I will then write you again fully.

Sincerely yours,

/s/ BERNARD POTTER.

BPSr:PW

Admitted in evidence Dec. 1, 1950.

(Testimony of Bernard Potter.)

Q. (By Mr. Flynn): Mr. Potter, I show you a letter dated May 17, 1937, [50] addressed to Dr. Jared H. Miller, purportively signed by you, and ask you if that is your signature at the bottom of that letter? A. It is.

Q. And is that letter with the exception of the pencil marks and the ink marks on it exactly as you sent it to Dr. Miller? A. That is true.

Mr. Flynn: I offer the letter into evidence as Respondent's exhibit next in order.

Mr. Bouchard: I don't object.

The Court: It is admitted.

The Clerk: Exhibit E.

(The document above referred to was marked Respondent's Exhibit E for identification and received in evidence.)

RESPONDENT'S EXHIBIT E

Potter & Potter

Attorneys at Law

Suite 814 Chester Williams Building

Los Angeles, California

May 17, 1937.

Dr. Jared H. Miller,
P. O. Box 685,
Rochester, Minnesota.

My dear Doctor:

Just after finishing a letter to you, I received yours of the 16th instant in which you say you had

(Testimony of Bernard Potter.)

hoped to be in my office by this date, but had been delayed.

You say that your Detroit business is still hanging fire but will have to let that go until you return. I do not quite understand what you mean, whether the unfinished business relates to the property settlement or not. I naturally assume, however, that you will have the whole thing thrashed out with Mr. Wheat before you come and will be ready to settle everything up, for the reason that naturally the divorce case will not be instituted until this is done. Your non-arrival before the fore part of June will not prejudice our interests in any way that I can see.

After you are served with a Summons and Complaint, it requires ten days before default can be entered and usually it requires three or four days after that before the matter can be heard and the interlocutory decree entered.

I think the above answers all the questions in your last letter. Am glad to know that I will see you before long.

Sincerely yours,

/s/ BERNARD POTTER.

BPSr:PW

Admitted in evidence Dec. 1, 1950.

(Testimony of Bernard Potter.)

Mr. Bouchard: You can put the other one in too without identification if you want to.

Mr. Flynn: All right. The next is dated July 7, 1937, from Mr. Potter to Mr. Miller.

The Court: It is received.

The Clerk: Exhibit F.

(The document above referred to was marked Respondent's Exhibit F for identification and received in evidence.) [51]

RESPONDENT'S EXHIBIT F

Potter & Potter

Attorneys at Law

Suite 814 Chester Williams Building

Los Angeles, California

July 7, 1937.

Dr. Jared H. Miller,
P. O. Lock Box #685,
Rochester, Minnesota.

My dear Doctor:

Your letter was received yesterday in which you stated that Mrs. Miller would meet her son in Salt Lake on the 8th and would return to Los Angeles on about the 1st of August.

I telephoned Mr. McCoy and he said that as soon as the 30 day period was up, after service of the Summons and Complaint on you, he would have the default entered. He was not sure just when the case could be set for hearing on account of the

(Testimony of Bernard Potter.)

courts usually being closed in August, but would communicate with the office immediately upon the setting of the case so that we could be present.

Whenever the case is set, you can be assured that either I or my son will be present to see that the property settlement agreement is approved by the court.

It is likely that I will be in Detroit about the 29th or 30th of July; however, when I know for certain, I will write you.

Hoping everything is going along fine with you, I remain

Your very truly,

/s/ BERNARD POTTER.

BP:B

Received in evidence Dec. 1, 1950.

Mr. Flynn: No further questions.

Cross-Examination

By Mr. Bouchard:

Q. I hate to cross-examine a lawyer, Mr. Potter—— A. Maybe it will make it easier.

Q. ——Especially one that has been practicing law since the year I was born. That is quite some time ago.

Mr. Potter——

The Court: That was a very important year.

(Testimony of Bernard Potter.)

Mr. Bouchard: Yes, it was.

Q. (By Mr. Bouchard): I understood from Judge McCoy's testimony that the financial part of this settlement was agreed on rather quickly after you had opened negotiations?

A. My recollection is—of course, that is fourteen years ago—that it was not very long. It did not take particularly long.

Q. And you started your negotiations some time along about October of 1936?

A. Yes, it was in the month of October.

Q. I understand from his testimony that the thing that took the most time was the division of this personal property that is set forth in Schedules A and B?

A. That did take up a lot of time. I wouldn't say that it took up most of the time because I had correspondence with [52] regard to it, which was the important thing.

Q. Of course, Dr. Miller was in the East during all the time these negotiations were going on, was he not?

A. I think all the time, that is my recollection.

Q. Nearly everything you represented him in here and your recommendations had to be transmitted to him and he took them up with his Detroit counsel, isn't that true? A. That is right.

I would like to say now that you have called attention to one thing that is a little different and that was the clauses that would be put in the agreement with reference to the disposition of the future

(Testimony of Bernard Potter.)

interest, that had to be gone over by attorney there because I was not familiar with the situation.

Q. The Detroit counsel was counsel for the mining company? A. That is right.

Mr. Bouchard: That is all.

Mr. Flynn: Your Honor, I have just one more question.

Redirect Examination

By Mr. Flynn:

Q. Mr. Potter, are you Dr. Miller's attorney at the present time?

A. I haven't been his attorney for I should say about ten years. He has other attorneys.

Q. And the Detroit counsel you have referred to in one [53] of these letters is Mr. Wheat?

A. Yes, Mr. Wheat.

Mr. Flynn: No further questions.

Mr. Bouchard: No questions.

The Court: The witness is excused.

(Witness excused.)

Mr. Flynn: The Respondent calls Dr. Miller. Whereupon,

JARED H. MILLER

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Have a seat, sir, and state your name and address.

The Witness: My name is Jared H. Miller and the address is 390 Grove Street, Pasadena.

(Testimony of Jared H. Miller.)

Direct Examination

By Mr. Flynn:

Q. Dr. Miller, calling your attention to the property settlement agreement, dated June 15, 1937—

A. Yes, sir.

Q. Would you have signed that agreement unless you were sure that you would get a divorce from the then Mrs. Miller?

Mr. Bouchard: Just a moment. That is objected to as being incompetent, irrelevant and immaterial. The question is [54] not what he would have done, the question is what he did do. I think it is an extremely leading question, counsel.

Q. (By Mr. Flynn): Mr. Miller, at the time you signed the agreement on June 15, 1937, what was your understanding—

A. Thirty-six?

Q. Thirty-seven.

A. Yes.

Q. What was your understanding at the time regarding whether or not Mrs. Miller would give you a divorce?

A. Obtain one herself, you mean?

Q. That is right.

A. That was my definite understanding.

Q. Dr. Miller, please tell the Court in your own words just exactly what you mean by your definite understanding.

A. Well, let me go into the details briefly. The property settlement agreement for her support or alimony—whatever you want to call it—had been going on for some time, and at first she objected to getting a divorce or giving me one. I informed

(Testimony of Jared H. Miller.)

my counsel, Mr. Potter, that under no circumstances would I sign any agreement for her support unless it was understood that she would proceed with and get a divorce. I told him that he could convey that to Mr. McCoy, her counsel, which I understood later he did, and it has borne out the facts that those events all happened after a very short period of time one [55] after the other.

I know in one letter Mr. Potter wanted to know if I would be back in California at about a certain date in order to sign the property settlement agreement and that he would have a summons in the divorce case because in that event the divorce could be disposed of more quickly. I wrote an answer in which I think it is clear that I would be and I was, and all those events followed within a short time.

Mr. Flynn: No further questions.

Cross-Examination

By Mr. Bouchard:

Q. Mr. Miller, as I understand your testimony it is that these events with regard to the securing of the divorce and your signing of the property settlement were all done pretty quickly, is that so?

A. The dates speak for themselves.

Q. I want your testimony. It happened pretty quickly, didn't it?

A. It happened within a very short space of time I would say.

Q. And you knew before you came out here, I

(Testimony of Jared H. Miller.)

take it you had been advised by Mr. Potter, your counsel—— A. Yes.

Q. ——that Mrs. Miller was going ahead and procuring a divorce, did you not? [56]

A. I understood from my counsel and I relied on his statement, and I wouldn't have come and signed the agreement unless he would have had a verbal understanding with Mr. McCoy to that effect.

Q. You gained that information very shortly before you came out here and then you came out and signed the agreement?

A. That is in the letter.

Q. I am asking for your testimony. I will find out what is in the letter.

When you were advised by your counsel that Mrs. Miller was going ahead and procuring a divorce, you immediately came out here and signed the agreement and were very promptly served with a divorce, is that correct?

A. That is right.

Q. Now, Doctor, you are interested in the outcome of this particular case, are you not?

A. No, sir. No, I am not.

Q. Are you aware of the fact that this income that we are talking about if it is not taxable to Mrs. Miller that it is taxable to you?

Mr. Flynn: Objection, your Honor, that calls for a conclusion of the witness.

The Court: It is cross-examination.

Q. (By Mr. Bouchard): You understand that, don't you? [57]

(Testimony of Jared H. Miller.)

A. No, sir, I don't. I understand they might try to get it from me, but there would have to be a suit, and I am advised by very eminent people that they would be glad to fight it for me.

Q. In other words, you are aware of the fact that the Government can undertake to disallow the deductions to you if Mrs. Miller is successful in her case?

A. I understand that they will attempt to do that.

Q. Now, have the Government agents requested waivers of the statute of limitations from you?

A. I don't recall, but if they did it would be in the office of my tax assessor, Parker & Parker.

Q. Of this city?

A. Yes, sir, under your office.

Q. Isn't it a fact, sir, that you have given the revenue agent's office in this city, waivers of the statute of limitations involving the years 1945, and 1946?

A. I wouldn't want to testify to that until the records were examined because I don't know.

Q. You don't know? You have no recollection of either the revenue agent's office or your counsel requesting you to sign waivers of the statute of limitations?

A. I do have for signing for the State of California.

Q. You have no recollection of it though for the Federal Government? [58]

(Testimony of Jared H. Miller.)

A. I am sure I do not have.

Q. Have your counsel advised you that if Mrs. Miller is successful in her case before this Court that the Government will undertake, no doubt, to disallow the deductions to you?

A. My counsel——

Mr. Flynn: I object. It is immaterial and irrelevant and not proper cross-examination.

The Court: No, it isn't. If I have to explain it to you, it is to show interest on the part of the witness that you have called. It is perfectly all right.

The Witness: No, sir.

Q. (By Mr. Bouchard): You have never been advised of that? A. No, sir.

Q. You said you were represented by eminent counsel?

A. No, I said eminent counsel have advised me that if such were the case they would be glad to undertake my side of the suit, and I can tell who that was if you want to know.

Q. I think I do.

Q. You do? I am not sure that you do.

Mr. Bouchard: That is all.

Mr. Flynn: No further questions.

The Court: Anything further?

Mr. Bouchard: Nothing further.

Mr. Flynn: Nothing further. [59]

The Court: Dr. Miller, you are excused.

(Witness excused.)

The Court: You may file briefs and I will give

you forty-five days for the original briefs and thirty days for the reply briefs. The case is closed.

We will adjourn until Monday morning at 9:30 a.m.

(Whereupon, at 5:30 o'clock p.m., an adjournment was taken until 9:30 o'clock a.m., Monday, December 4, 1950.)

[Endorsed]: Filed September 12, 1949. [60]

[Title of Tax Court and Cause.]

Docket Nos. 23268, 24478

FINDINGS OF FACT AND OPINION

16 T.C. No. 124

Promulgated May 14, 1951.

Income — Agreement Incident to Divorce — Section 22(k).—Where all but some relatively unimportant provisions of a property settlement had been agreed upon during the time when the wife had no intention of obtaining a divorce, the agreement is not “incident to” a divorce within the meaning of section 22(k) merely because the wife, prior to the actual signing of the agreement, decided that she would try to obtain a divorce and her husband learned of her change of mind in regard to the divorce but was given no promise or assurance that she would proceed to obtain a divorce.

GEORGE BOUCHARD, ESQ.,

For the Petitioner.

WILLIAM B. FLYNN, JR., ESQ.,

For the Respondent.

The Commissioner determined a deficiency in income tax of \$1,207.00 for 1945, and one of \$995.60 for 1946. The only issue for decision is whether payments of \$6,300.00 received by the petitioner in each year are taxable to her under section 22(k).

Findings of Fact

The petitioner filed her individual income tax returns for the taxable years with the collector of internal revenue for the sixth district of California.

The petitioner has a son, born in 1911, a child of her first husband who died in 1913. She was married for the second time in 1921, and became the fifth wife of Jared H. Miller, 20 years her senior. They lived together for about 15 years. No children were born of their marriage.

The petitioner discovered in March, 1936, that Miller was being intimate with another woman in Rochester, Minnesota. The Millers resided in Fontana, California, where they had lived for a number of years. He confessed and they agreed that they would try to continue to live together and he would try to forget the other woman.

Miller had inherited from his fourth wife an undivided interest in some mining property in Michigan. He left Fontana on July 24, 1936, for a

visit to the mining properties, after which he planned to return to Fontana in September, 1936. He and the petitioner corresponded during his absence. Miller wrote to the petitioner late in September, 1936, informing her that he would not return to her and advising her to seek the advice of a lawyer in order to obtain a property settlement. Neither mentioned divorce to the other. She wrote to Miller in an effort to persuade him to return but never received another letter from him and thereafter they communicated only through attorneys.

The petitioner sought the advice of an attorney in October, 1936. She told him that she did not want a divorce but wanted a property settlement. Miller had been giving her an allowance of \$400.00 a month and continued those payments until the property settlement became effective. The attorney for the petitioner, and another Los Angeles attorney, acting for Miller, agreed, prior to March, 1937, upon all terms of a property settlement satisfactory to their clients, except as to the division of over 400 articles or groups of articles such as silver, furniture, draperies, pictures, jewelry, clothing, and other household furnishings and personal belongings, the division of which, by listing on two schedules to be attached to the settlement agreement, was not completed until May, 1937. The delay in reaching an agreement in regard to those personal items was due principally to the fact that Miller's attorney had to confer with him by mail.

Neighbors and friends of the petitioner kept asking her when her husband was going to return and this caused her to become increasingly embarrassed as time passed because she did not like to disclose that he had abandoned her. She told her attorney in late April, 1937, that she had decided to seek a divorce. Her attorney told the attorney representing Miller of her change of mind and the latter passed on the news to Miller late in April, 1937.

All terms of the property settlement had been agreed upon and the written instrument of settlement with complete schedules attached had been drawn up by the latter part of May, 1937, but the attorneys for the two spouses learned that Miller intended to come to Los Angeles in the near future and they decided to have the agreement signed when he got there. The agreement recites that it was entered into on June 15, 1937, and it was signed on that day. It recited that the parties were desirous of settling all of their property rights. Real and personal property owned by Miller was mentioned in the agreement, and it also stated that the petitioner had no property other than the personal property described in the schedule, and cash. Miller agreed to give to the petitioner a life interest in the property at Fontana, which they had occupied as a residence, to be used by her and the members of her immediate family as a home. He was to pay the taxes and other charges incident to ownership and protection of the property and the petitioner was to pay all expenses for the ordinary care and upkeep of the property.

Miller was to pay the petitioner \$6,300.00 a year as long as she lived. Total payments of \$3,650.00 were to be made for 1937. Provisions were made for the continuation of payments by Miller's estate if he predeceased the petitioner, and for payments to the petitioner's son and mother in case they survived the petitioner. More than 400 articles or groups of articles were listed in two schedules attached to the agreement, Miller was to have those listed in Schedule A and the petitioner was to have those listed in Schedule B. The agreement was to be in complete settlement of all property rights between the parties. They both agreed to perform whatever acts were necessary to carry it out. One paragraph of the agreement was as follows:

“This agreement shall not alter the relations of the parties hereto except with regard to their property rights; provided, however, that in the event that either party hereto shall obtain a divorce from the other, this agreement may be submitted to the court in which said divorce is obtained for approval.”

The agreement did not contain any provision, other than the above-quoted one, referring to the subject of divorce. No suggestion was ever made to the petitioner or her attorney that the property settlement agreement was contingent in any way upon her obtaining a divorce. There was no understanding or agreement between the petitioner and her husband at the time they entered into the property settlement agreement that it was contingent in any way upon her obtaining a divorce.

The attorney for the petitioner advised her to file her complaint for divorce while Miller was in California to sign the settlement agreement and could be served, thus avoiding delay in the final decree of divorce. She acted on that advice and filed her complaint for divorce in the Superior Court of California on June 23, 1937. A summons in that proceeding was served upon Miller in Los Angeles on that same day. Miller did not contest the divorce and an interlocutory judgment of divorce by default was entered on August 24, 1937. It recited that the property settlement agreement, dated June 15, 1937, had been filed as an exhibit in the proceeding and was "approved." A final judgment of divorce was entered on August 25, 1938, on a printed form on which only names and dates had been typed. The words printed on that form included the following: "That wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties declared therein to be entitled thereto."

The petitioner and Miller entered into a supplemental property agreement on April 19, 1938, whereby the residence property at Fontana was to be conveyed to the petitioner absolutely and nine pieces of personal property theretofore awarded to the petitioner were to be surrendered by her to Miller. Otherwise, the terms of the original agreement were to remain in full force and effect. The supplemental agreement was never shown to the court in the divorce proceeding.

Miller, at times not shown, paid the fee of the petitioner's attorney for his services to her in connection with the settlement agreement and also paid his separate fee for his services in securing the divorce for her.

The petitioner reported as her only income for 1945, and 1946, the annual payments of \$6,300.00 received from Miller under the agreement of June 15, 1937. She reported no tax due and attached a statement showing the source of the funds and claiming that they were not taxable to her under section 22(k). The Commissioner, in determining the deficiencies, held that the payments were taxable to the petitioner under section 22(k).

OPINION

Murdock, Judge:

The settlement agreement in the present case was entered into in 1937. Section 22(k) became a part of the Internal Revenue Code in 1942. Thus, the petitioner and her husband did not have the new provisions of the law in mind at the time they entered into their agreement. It is not claimed that the decree of divorce imposed any obligation on Miller to make periodic payments to the petitioner. Section 22(k) provides that periodic payments received by a divorced wife, subsequent to the decree of divorce in discharge of a legal obligation which, because of the marital or family relationship is imposed upon or incurred by a husband under a written instrument incident to the divorce, shall be

includable in the gross income of the wife. The only difference between the parties is whether the written instrument under which the periodic payments were paid was "incident to" the divorce later obtained by the petitioner.

Not every agreement which is followed by a divorce is "incident to" the divorce within the meaning and intent of section 22(k). It is now pretty well recognized as a result of numerous decisions that a written instrument to be "incident to" a divorce must be part of an integral plan of the two spouses which included the obtaining of a divorce, the agreement under which the periodic payments are made, as one court has expressed it, must be a "part of the package of divorce." *Cox v. Commissioner*, 176 F. 2d 226, affirming 10 T.C. 955. The chief difficulty has been to determine from the facts in each individual case whether the necessary connection between the two exists. That connection is rather obvious where a divorce action had been commenced and the parties thought it was still pending at the time they signed the agreement. *George T. Brady*, 10 T.C. 1192. Sometimes for other reasons it may appear that the spouses entered into their agreement with a mutual understanding that it was to be followed promptly by a suit for divorce as a part of their entire plan. All of the surrounding circumstances convinced the court in the case of *Estate of Daniel G. Reed*, 15 T.C. 573, that both parties in making the property settlement were doing so with an implied understanding that it would be followed by a divorce and that it was not

something which they would have done had they not intended a divorce to follow. The fact that the two steps are a part of a single plan is clear where there is an express agreement or promise that one spouse is to sue for a divorce promptly following the agreement calling for the periodic payments. Robert Wood Johnson, 10 T.C. 647; Bertram G. Zilmer, 16 T.C. . . . , (Feb. 19, 1951). However, an agreement providing for periodic payments can not be said to be incident to a divorce later obtained where it was separate from the divorce and was arrived at for its own benefits even though shortly thereafter one spouse sued for divorce. Joseph J. Lerner, 15 T.C. 379. The fact that one spouse may be considering the possibility of a divorce is not enough to make the agreement "incident to" a divorce later obtained.

The present case is similar in a number of respects to the Lerner case. The petitioner and her husband had never discussed divorce and she had no intention of obtaining a divorce at the time they started, through their attorneys, to negotiate the property settlement. Furthermore, before the petitioner changed her mind and disclosed that fact to her attorney, the attorneys, with the approval of their clients, had agreed upon those terms of the property settlement under which the periodic payments here in question were made. If that situation had continued until they had signed the property agreement, this case would be indistinguishable from the Lerner case.

The difference is that while they were trying to divide up a lot of relatively small personal articles and before they signed the agreement, the petitioner told her attorney that she had changed her mind and wanted to obtain a divorce. She did not intend that information to be used in connection with the property settlement. Her attorney told Miller's attorney of her mental attitude and Miller learned of it. But it was merely information and not a promise or condition connected with the property settlement. However, Miller appeared as a witness for the Commissioner and testified that he had heard that Mrs. Miller was thinking of getting a divorce and he told his counsel to advise counsel for the petitioner that under no circumstances would he sign any agreement for her support unless it was understood that she would obtain a divorce. He testified, further, that he would not have come to California and signed the agreement without a verbal understanding with the attorney for the petitioner that she was going to obtain a divorce. Miller's attorney testified, as a witness for the Commissioner, that the property settlement was predicated upon the understanding that the petitioner would file a divorce suit. Neither Miller nor his attorney ever talked to the petitioner about a divorce and there is no reason to disbelieve her testimony to the effect that she never promised or agreed to obtain a divorce as a condition to the property settlement. Miller and his attorney did not deny that they had agreed upon all provisions

of the property settlement, except the items on Schedules A and B, months before the subject of divorce was ever mentioned. The attorney who represented the petitioner in the property settlement and later in the divorce never dealt directly with Miller in regard to the property settlement agreement. He denied that he had given any assurance to Miller's attorney prior to the signing of the property settlement agreement that the petitioner would obtain a divorce. He said he had never been asked to give any such assurance and had never had any discussion with Miller's attorney indicating that the property settlement was in any way connected with the divorce. He testified without equivocation that the property settlement agreement was entered into without any understanding or obligation that the petitioner would proceed with a divorce action. The Court feels that Miller and his attorney are mistaken and have testified more strongly for the Commissioner than the actual situation up to June 15, 1937, justifies.

Although the petitioner had told her attorney that she had decided to obtain a divorce, and although Miller knew that, nevertheless, she was free to make a new decision that she would not obtain a divorce. The property settlement was still separate in the mind of the petitioner from any action which she might subsequently take in regard to any divorce. She had sought the property settlement for its own benefits when she had no thought of divorce. She sought it because she wanted a settlement of her

property rights and funds on which to live. Miller was aware of that but, at the time he signed the agreement, was hoping that his wife would seek and obtain a divorce, yet he had merely his hope to rely upon. It had not been a foregone conclusion from the beginning that the wife would obtain a divorce, as was true in some of the cases cited above, and there was no mutual understanding between them on which he could rely or from which the petitioner might feel any obligation, moral or otherwise, impelling her to seek a divorce. In short, the property agreement in this case was not a part of an integral plan, which plan included an honest attempt on the part of the petitioner to obtain a divorce. It was not a part of the package of the divorce which was later obtained.

Decisions will be entered for the petitioner.

[U. S. Tax Court Seal.]

Served May 14, 1951.

The Tax Court of the United States
Washington

Docket No. 23268

CECIL A. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated May 14, 1951, it is

Ordered and Decided: That there is no deficiency in income tax for the year 1945.

Entered May 16, 1951.

Served May 17, 1951.

[Seal] /s/ J. E. MURDOCK,
Judge.

The Tax Court of the United States
Washington

Docket No. 24478

CECIL A. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated May 14, 1951, it is

Ordered and Decided: That there is no deficiency in income tax for the year 1946.

Entered May 16, 1951.

Served May 17, 1951.

[Seal] /s/ J. E. MURDOCK,
Judge.

[Title of Court of Appeals and Cause.]

T.C. Docket Nos. 23268 and 24478

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for

the Ninth Circuit to review the decisions entered by the Tax Court of the United States on May 16, 1951, that there are no deficiencies in respect of the income tax liability of Cecil A. Miller, the above-named respondent on review, for the taxable years 1945 and 1946. This petition for review is filed pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Cecil A. Miller, is an individual residing at 174 South Mango Street, Fontana, California. Respondent's Federal income tax returns for the years 1945 and 1946, the taxable years here involved, were filed with the Collector of Internal Revenue for the Sixth District of California, whose office is located in Los Angeles, California, and within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, where this review is sought.

Nature of Controversy

The sole question presented to and passed upon by the Tax Court contrary to the Commissioner's determination is whether there is includible in the taxpayer's gross taxable income for each of the years involved, under section 22(k) of the Internal Revenue Code, the sum of \$6,300.00 received by her from her former husband, Dr. Jared H. Miller, under the provisions of a property settlement entered into by the taxpayer and her former husband on June 15, 1937, prior to the institution by the taxpayer of a suit for divorce. The Court disagreed with the Commissioner's determination that the tax-

payer was liable for a tax on the payments so received by her and held that the settlement agreement was not "incident to" a divorce within the meaning of section 22(k) of the Internal Revenue Code, as a result of which holding decisions were entered on May 16, 1951, that there are no deficiencies in income taxes for the years 1945 and 1946.

On June 23, 1937, the respondent on review, Cecil A. Miller, filed, in the Superior Court of California, a complaint for a divorce from her husband, Jared H. Miller. A summons in the matter was served upon her husband in Los Angeles on that date. The complaint was heard on default and an interlocutory judgment of divorce was entered on August 24, 1937. A final judgment of divorce was entered on August 25, 1938.

Prior to the institution of her suit for divorce and after a rift had occurred between the respondent and her husband in respect of their marital relationship, Mrs. Miller and her husband had agreed upon the terms of a property settlement, the terms of which were embodied in a written instrument dated as of June 15, 1937, on which latter date the agreement was signed. The settlement agreement provided, among other things, that

"This agreement shall not alter the relations of the parties hereto except with regard to their property rights; provided, however, that in the event that either party hereto shall obtain a divorce from the other, this agreement may be submitted to the court in which said divorce is obtained for approval."

In her Federal income tax returns for the years 1945 and 1946 the taxpayer, the respondent on review, reported as her only income for those years the annual payments of \$6,300.00 received from her former husband under the agreement of June 15, 1937. She reported no tax due in respect of the receipt of such payments and claimed that such payments were not taxable to her under section 22(k) of the Internal Revenue Code. In his notices of deficiencies for the taxable years here involved the Commissioner held that the payments so received by Mrs. Miller were taxable to her under section 22(k). The Tax Court of the United States disagreed with the Commissioner's determination, holding that the agreement of June 15, 1937, was not "incident to" a divorce within the meaning of section 22(k) of the Internal Revenue Code, and as a result of such holding entered its decisions that there are no deficiencies in income tax for the years 1945 and 1946.

The two cases bearing the docket numbers mentioned above were consolidated for hearing before the Tax Court, and one opinion, 16 T.C. No. 124, was promulgated on May 14, 1951.

/s/ THERON L. CAUDLE,
Assistant Attorney General;

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

[Endorsed]: Filed Aug. 6, 1951, U.S.T.C.

[Title of Court of Appeals and Cause.]

T.C. Docket Nos. 23268 and 24478

NOTICE OF FILING PETITION
FOR REVIEW

To Mrs. Cecil A. Miller, 174 South Mango Street,
Fontana, California:

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of August, 1951, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 6th day of August, 1951.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Service acknowledged.

[Endorsed]: Filed Aug. 21, 1951, U.S.T.C.

[Title of Court of Appeals and Cause.]

T.C. Docket Nos. 23268 and 24478

NOTICE OF FILING PETITION
FOR REVIEW

To George Bouchard, Esquire, 650 S. Spring Street,
Los Angeles 14, California:

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of August, 1951, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 6th day of August, 1951.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel
for Petitioner on Review.

Service acknowledged.

[Endorsed]: Filed Aug. 21, 1951, U.S.T.C. .

[Title of Tax Court and Cause.]

ORDER ENLARGING TIME

On motion of counsel for petitioner on review, it is Ordered: That the time for preparation, transmission and delivery of the record sur petition for review of the above-entitled proceeding in the United States Court of Appeals for the Ninth Circuit is extended to Nov. 2, 1951.

[Seal] /s/ JOHN W. KERN,
 Chief Judge.

Dated Washington, D. C., August 31, 1951.

Served Sept. 5, 1951.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 30, inclusive, constitute and are all of the original papers and proceedings, including all original exhibits, 1 thru 5, and A thru F, admitted in evidence, on file in my office as the original and complete record in the proceedings before the Tax Court of the United States entitled: "Cecil A. Miller, Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket Nos. 23268 and 24478, and in which the respondent in the Tax Court has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 25th day of October, 1951.

[Seal] /s/ RALPH A. STARNES,
Chief Deputy Clerk, the Tax Court of the United
States.

[Endorsed]: No. 13145. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Cecil A. Miller, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed October 29, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

T.C. Docket Nos. 23268 and 24478

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

CECIL A. MILLER,
Respondent on Review.

STATEMENT OF POINTS

Comes Now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Theron L. Caudle, Assistant Attorney General, and Charles Oliphant, Chief Counsel, Bureau of Internal Rev-

enue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In entering its decisions that there are no deficiencies in income tax for the years 1945 and 1946.

2. In failing and refusing to sustain the deficiencies in tax determined by the Commissioner.

3. In holding and deciding that there was not includible in the taxpayer's gross taxable income for each of the years 1945 and 1946, under section 22(k) of the Internal Revenue Code, the sum of \$6,300 received by her from her former husband under an agreement entered into by the taxpayer and her former husband on June 15, 1937.

4. In failing and refusing to hold and decide, as was determined by the Commissioner, that there is includible in the taxpayer's gross taxable income for each of the years 1945 and 1946, under section 22(k) of the Internal Revenue Code, the sum of \$6,300 received by her from her former husband under an agreement entered into by the taxpayer and her former husband on June 15, 1937.

5. In holding that the agreement of June 15, 1937, between the taxpayer and her husband was not "incident to" a divorce within the meaning of section 22(k) of the Internal Revenue Code.

6. In failing and refusing to hold and decide that the agreement of June 15, 1937, was "incident

to" a divorce within the meaning of section 22(k) of the Internal Revenue Code.

7. In failing to find as a fact that the property settlement agreement between the taxpayer and her husband was predicated upon an implied understanding that the taxpayer, Mrs. Miller, would institute a suit for divorce.

8. In that its findings of fact, insofar as they are contrary to the Commissioner's determination, and its opinion are not supported by but are contrary to the evidence.

9. In that its opinion and its decisions are contrary to law and the Commissioner's regulations.

/s/ THERON L. CAUDLE,
Assistant Attorney General;

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Service acknowledged.

[Endorsed]: Filed Oct. 18, 1951, U.S.T.C.

[Title of Court of Appeals and Cause.]

T.C. Docket Nos. 23268 and 24478

STATEMENT RE DIMINUTION
OF RECORD

To the Clerk of the Tax Court of the United States:

Pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure adopted by the United States Court of Appeals for the Ninth Circuit, you are hereby notified that the petitioner on review will not exclude or omit any part of the record in this proceeding.

/s/ THERON L. CAUDLE,
Assistant Attorney General;

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Service acknowledged.

[Endorsed]: Filed Oct. 18, 1951, U.S.T.C.